Ending the Interminable Gap in Indian Country Water Quality Protection

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Abstract

Tribal self-determination in modern environmental law holds the tantalizing prospect of translating Indigenous environmental value judgments into legally enforceable requirements of federal regulatory programs. Congress authorized this approach three decades ago, but few tribes have sought primacy even for foundational programs like Clean Water Act water quality standards, contributing to potentially serious environmental injustices. This article analyzes in detail EPA's recent attempt at reducing tribal barriers—reinterpreting the Act as a congressional delegation of tribal jurisdiction over non-Indians—and the early indications its results are insignificant. The article then proposes an unconventional solution ostensibly at odds with tribal self-determination: promulgation of national, federal water quality standards for Indian country. EPA's Indian Program actually began this way, as an interim step awaiting tribes' assumption of federal regulatory programs. Thirty years later, the seemingly interminable regulatory gap in Indian country water quality protection remains, and EPA has a legal and moral responsibility to close it.

From an indigenous perspective, the "self" of the right to self-determination can be conceptualized as not just the people but also the territory, the web of life, the flora and fauna, and the natural resources upon which life depends. An Indian tribe, in exercising its right to protect the environment, may understand the "self" in this way: the reservation is the place where the tribe's way of life exists, and its way of life includes much more than the people.

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[*] Dean B. Suagee, *A Human Rights-Based Environmental Remedy For The Legacy Of The Allotment Era in Indian Country*, 29-SUM NATRE 3, 4 (2014)

INTRODUCTION

The modern Clean Water Act's cooperative federalism is typified by the requirement water polluters must comply with federal technology-based standards and site-specific water quality value judgments set by local governments. Site-specific water quality standards are critically important for Indian tribes as Indigenous peoples face similar but not identical health risks non-Indians do. Tribal welfare concerns are often quite different because environmental quality is inextricably entwined with Indigenous culture based on ancient relations with the natural environment.[1] Hence, water pollution permits that do not account for Indigenous cultural uses of water risk environmental injustice in a manner reminiscent of early colonial attempts at assimilation.

The national policy of tribal self-determination held obvious possibilities for incorporating cultural values into the water pollution permitting process, and although the policy's origin coincided with the birth of the modern environmental era, Congress initially overlooked tribes in providing local roles to state governments in the Clean Water Act (CWA). The newly created Environmental Protection Agency[2] (EPA) recognized the opportunity first, adopted a policy acknowledging tribes as the appropriate local governments for making site-specific environmental value judgments that would animate federal programs, and Congress followed suit amending the CWA authorizing tribal

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[1] *See* Dean B. Suagee, *Environmental Justice And Indian Country*, 30-FALL HUMRT 16 (2016) (noting different disproportionate impacts stemming from the ways in which tribal cultures are rooted in the environment materially (hunting, fishing, gathering, crafts) and religiously (ceremonies and other practices, oral traditions) resulting in identity perception, creating "a unique type of suffering" when sacred places are damaged or destroyed).

[2] Reorg. Plan No. 3 of 1970 (Oct. 6, 1970), available at https://archive.epa.gov/epa/aboutepa/reorganization-plan-no-3-1970.html.

"treatment as a state" (TAS) for a number of programs including water quality standards (WQS).[3]

Tribal TAS status effectively embraced self-determination by placing the responsibility for articulating tribal uses of reservation waters and the criteria for protecting them on tribes. Those tribal value judgments were then to be translated into pollution permit conditions ensuring protection of tribal health and welfare. A handful of Indian tribes developed WQS with great success, but the overwhelming majority of tribes have not taken advantage of the opportunity.[4] A number of reasons may explain their hesitation, but fear of litigation challenging tribal sovereignty and the status of their lands are likely key factors. EPA used its administrative environmental expertise to limit some of litigation risks at the outset, and when that resulted in few tribal TAS programs, exercised that discretion recently.

This article addresses those efforts in detail, and concludes that EPA can no longer justify its tolerance of the significant regulatory gap that exists in Indian country water quality protection. Section I briefly describes the central role water quality standards play in the implementation of the Clean Water Act's main programs. Section II explores the complex legal context EPA confronted in implementing Congress' authorization for treating tribal governments as partners in protecting water quality in the same manner as states. Section III analyzes EPA's recent reinterpretation of the Act after decades of tribal inaction raise the question whether tribes desire self-determination over reservation water quality

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[3] Clean Water Act Amendments of 1987, P.L. No. 100-4, Title V, § 506, 101 Stat. 76 (Feb. 4, 1987) (codified at 33 U.S.C. § 1377(e)).

[4] *See* EPA Actions on Tribal Water Quality Standards and Contacts, available at https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts.

protection. Section IV proposes EPA promulgate federal water quality standards for Indian country closing the three decades-old regulatory gap in nationwide protection, addressing the environmental injustice it created, and perhaps spurring tribal action tailoring the federal standards to site-specific values or finally developing tribal water quality standards ensuring Indigenous water uses are legally recognized and protected.

I. BACKGROUND ON THE SIGNIFICANCE OF WATER QUALITY STANDARDS

Initially enacted in 1972 as the Federal Water Pollution Control Act,[5] the statute now commonly known as the Clean Water Act (CWA) relied heavily on the modern cooperative federalism model first set out in the federal Clean Air Act (CAA) enacted just two years earlier.[6] Congress clearly intended the CWA's main program—NPDES[7] permits for water pollution discharged from point sources—be implemented by states[8] under EPA's supervision. States were not required to do so, and Congress authorized EPA direct implementation if states did not,[9] but most states did seek and receive NPDES permit program delegation from EPA. Whichever government issued the permits, the federal-state partnership was built into the two fundamental kinds of permit conditions: those based on technological pollution control options identified by EPA, and those based on water quality at the point of discharge as determined by the state.

The starting point for NPDES permits is compliance with national effluent limits based on technological pollution control techniques identified by EPA for categories and

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[5] Pub. L. No. 92-500, 86 Stat. 816 (Oct. 18, 1972).
[6] Pub. L. No. 91-604, 84 Stat. 1768 (Dec. 31, 1970).
[7] Environmental law is rife with acronyms. NPDES is the commonly used reference for permits issued under the National Pollution Discharge Elimination System. *See* 33 U.S.C. § 1342 (1995).
[8] *Id.* at § 1342(b).
[9] *Id.* at § 1342(c)(1).

subcategories of industry.[10] Technology-based permit conditions are uniform across the nation and do not take account of site-specific circumstances or needs. In contrast, the other fundamental condition of NPDES permits is premised on site-specific conditions. If the uniform technology-based standards can't achieve the level of water quality needed for the uses designated at the point of discharge, then additional permit conditions are required[11] to ensure progress toward the CWA's goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.[12]

That progress is primarily measured by water quality standards (WQS).[13] For each body (or segment) of surface water (rivers, lakes, streams, etc.) within its territory, the state first designates the uses currently made and desired to be made in the future.[14] At a minimum, states must designate water uses for the protection and propagation of aquatic species, and human recreation,[15] often called the fishable/swimmable standards. The state then sets water quality criteria to protect the designated uses. These criteria are typically stated in numeric terms,[16] but they can also be narrative descriptions of water quality protective of the designated uses.[17] EPA issues guidance on water quality criteria that

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[10] 33 U.S.C. § 1342(a)(1)(A); 40 C.F.R. at § 122.44(a)(1).
[11] 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. at § 122.44(d)(1).
[12] 33 U.S.C. § 1251(a).
[13] *Id. at* § 1313.
[14] *Id. at* § 1313(c)(2)(A).
[15] *See id. at* § 1251(a)(2) (stating "it is the national goal that wherever attainable ... water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water").
[16] *See* 40 C.F.R. at § 131.11(b)(1). For example, maximum levels of Selenium in Fish Tissue might be "8.5 mg/kg dw or 11.3 mg/kg dw muscle (skinless, boneless filet)." *See* EPA's Model Water Quality Standards Template for Waters on Indian Reservations Table 3 (2016), available at https://www.epa.gov/wqs-tech/water-quality-standards-tools-tribes.
[17] *See* 40 C.F.R. at § 131.11(b)(2). For example, "[a]ll waters ... shall be free from toxic, radioactive, conventional, non-conventional, deleterious or other polluting substances in amounts that will prevent attainment of the designated uses specified." *See* Indian Standards Template, *supra* note __, at (c)(1).

states may adopt,[18] or states may use alternate means to set criteria so long as they show the criteria are protective of the designated uses and are attainable.[19] While each state's criteria must ensure protection of the CWA's minimum uses, states are free to set criteria more stringent than those recommended by EPA.[20] Together, the state's designated uses and criteria constitute the WQS.[21]

Each state's WQS—its designation of the water uses desired, and the criteria needed to protect them—represent value judgments made by the state in balancing its citizens' environmental, economic, social and cultural interests. Those value judgments are animated legally by discharge permit conditions. If the uniform, national technology-based standards do not ensure a proposed pollution discharge will comply with site-specific WQS, then additional permit conditions are required to do so.[22] Where the state issues the permit, it presumably includes conditions protective of its waters. Consistency with the CWA is ensured by requiring draft permits be sent to EPA for review of including applicable WQS.[23] For states where EPA issues NPDES permits, and for the various other permits and licenses issued by other federal agencies for discharges into a state's waters, CWA section 401 requires certification by the state that proposed conditions in the permit or license comply with the state's WQS.[24]

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[18] 33 U.S.C. § 1314.
[19] *See* 40 C.F.R. at § 131.11(b)(1)(ii) (criteria based on EPA Guidance but modified to reflect site-specific conditions), and § 131.11(b)(1)(iii) (criteria based on other scientifically defensible methods).
[20] 33 U.S.C. § 1370.
[21] 33 U.S.C. § 1313(c)(2)(A). EPA also requires a state establish antidegradation requirements so that waters of exceptionally high quality are maintained. *See* 40 C.F.R. § 131.12.
[22] 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. at § 122.44(d)(1).
[23] *Id.* at § 1342(d)(1).
[24] *Id.* at § 1341(a).

Legally permitted pollution discharged in one state sometimes flows into a downstream state. As with the other federal environmental laws, Congress of course sought in the CWA nationwide protection. All states' WQS must ensure protection of the CWA's minimum uses, and if all states simply adopted minimum criteria then transboundary pollution would be sufficiently controlled by conditions imposed at the point of discharge. However, not all states select minimum standards. Congress accommodated states' police powers for protecting the public's health and welfare by authorizing state standards more stringent than minimum federal ones.[25] EPA lacks authority to second-guess the state's judgment for a more stringent standard; EPA ensures only that the WQS protects the CWA's minimum uses and is attainable.[26] Two key approaches preserve the integrity of a downstream state's more stringent criteria. One is the requirement that states' WQS ensure attainment and maintenance of downstream jurisdictions' WQS.[27] The other requirement is that state-issued NPDES permits contain conditions ensuring pollution discharges do not violate the WQS of downstream states.[28]

II. TRIBAL WATER QUALITY STANDARDS

A. Background on EPA's Indian Program

EPA's Indian program is indisputably the most robust of all federal agencies not directly charged with regulating Indian country, and coincidentally, it began in the context of the CWA's NPDES program. Congress' 1972 version of the CWA was silent on Indian

[25] *Id.* at. § 1370.
[26] Compare 40 C.F.R. § 131.4(a) (state authority to set WQS more stringent than federal minimum standards) *with* 40 C.F.R. § 131.5(b) (EPA approves state WQS that meet minimum federal requirements).
[27] 40 C.F.R. § 131.10(b).
[28] *Id.* at. § 122.4(d). *See also* Arkansas v. Oklahoma, 503 U.S. 91 (1992).

country implementation.[29] As EPA developed its CWA regulations for state primacy in 1973, the Supreme Court echoed a longstanding federal Indian law theme: states generally lack regulatory authority over Indians in Indian country unless clearly authorized by Congress.[30] Nothing in the CWA reflected such congressional authorization, so EPA's 1973 regulations said an otherwise satisfactory state program would not be approved for Indian activities on Indian lands within the state.[31]

That legally correct conclusion and logical result revealed Congress' significant oversight in building the cooperative federalism model into modern environmental law: EPA's state partners could not achieve nationwide environmental protection because of their limited authority in Indian country. In other words, Congress had (inadvertently) created a regulatory gap in national environmental protection with serious ramifications:

> [W]ithout some modification, our programs, as designed, often fail to function adequately on Indian lands. This raises the serious possibility that, in the absence of some special alternative response by EPA, the environment of Indian reservations will be less effectively protected than the environment elsewhere. *Such a result is unacceptable.* The spirit of our Federal trust responsibility and the clear intent of Congress demand full and equal protection of the environment of the entire nation without exceptions or gaps.[32]

EPA's recognition that American Indians potentially faced disproportionate health and welfare risks because of the regulatory gap preceded the environmental justice (EJ)

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[29] Despite its silence, EPA assumed the CWA applied to Indian country. The first reported Indian country environmental law case in the modern era, decided the same year the CWA was enacted, applied the National Environmental Policy Act's requirement for an environmental impact statement to an Indian pueblo despite the law's silence on its application. Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972).

[30] *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable to tribal Indians or an Indian reservation except where Congress has expressly provided that State laws shall apply"); *id.* at 168 (emphasizing that the "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history").

[31] National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (to be codified at 40 C.F.R. § 125.2(b)).

[32] EPA POLICY FOR PROGRAM IMPLEMENTATION ON INDIAN LANDS 3 (Dec. 19, 1980) (emphasis in original) [hereinafter 1980 INDIAN POLICY].

movement by more than a decade. EPA's 1973 NPDES regulations and other actions taken in the mid-70s, discussed *infra*, were arguably the agency's first programmatic EJ actions. The "special alternative response" selected for the CWA in 1973 was that EPA would directly implement the NPDES program for Indian facilities rather than delegate it to states.[33] That approach accounted for states' limited authority in Indian country, and gave some substance to the federal government's trust responsibility to tribes. The 1973 rule thus set the foundation of the agency's nascent Indian program: EPA would directly implement federal environmental programs rather than delegate them to states.

The natural next step in the spirit of cooperative federalism was finding an alternate local partner. Within just a few years, Congress affirmed state-like environmental regulatory roles for tribes in two specific programs[34] generating momentum for an administrative cross-program effort. In 1980, EPA became the first federal agency with an official Indian Policy.[35] The "heart" of the Policy was EPA's view that tribal governments should play "a key role in implementing pollution control programs affecting their reservations."[36] EPA refined and reissued its Indian Policy in 1984,[37] which continues to

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[33] 38 Fed. Reg. at 13,530.

[34] *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, title I, sec. 127(a), 91 Stat. 733 (Aug. 7, 1977) (to be codified at 42 U.S.C. § 7474(c) (authorizing reservation airshed redesignations by Indian governing bodies); To Amend the Federal Insecticide, Fungicide and Rodenticide Act, Pub. L. No. 95-396, 92 Stat. 834 (1978) (to be codified at 7 U.S.C. § 136u(a) (providing federal assistance to tribes to train and certify applicators consistent with EPA regulations that required non-Indian commercial applicators be certified by the tribe, 40 C.F.R. § 171.307).

[35] In 1980 and 1981, the national organization Americans for Indian Opportunity surveyed three federal departments and over 25 federal agencies with statutory responsibilities affecting Indian country health. Its report listed EPA as the sole federal agency with an official Indian policy, citing the 1980 INDIAN POLICY. AMERICANS FOR INDIAN OPPORTUNITY, HANDBOOK OF FEDERAL RESPONSIBILITY TO INDIAN COMMUNITIES IN AREAS OF ENVIRONMENTAL PROTECTION AND INDIVIDUAL HEALTH AND SAFETY 85 (1981).

[36] Memorandum from Barbara Blum, Deputy Adm'r, to Reg'l Adm'rs et. al 1 (Dec. 19, 1980) (on file with author) (transmitting the 1980 EPA POLICY FOR PROGRAM IMPLEMENTATION ON INDIAN LANDS).

[37] EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (Nov. 8, 1984), *available at* https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf [hereinafter "1984 INDIAN POLICY"].

guide the agency today. The 1984 Indian Policy's "cornerstones" were respect for tribal self-determination and a commitment to working with tribes on a government-to-government basis, implemented by "including Tribal Governments as partners in decision-making and program management on reservation lands, much as we do with State Governments off-reservation."[38] More specifically, the Policy said:

> The Agency will recognize Tribal Governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations.[39]

Knowing it had very limited statutory authority to realize that goal, EPA included a Policy Principle that it would take steps "to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs."[40] First on the agenda was developing a legislative strategy for amending the environmental laws.[41] EPA was quick, and with the help of interested tribes, fairly effective in getting state-like tribal regulatory roles added to key environmental statutes. In 1986, Congress amended the Safe Drinking Water Act (SDWA) so that "[EPA's] Administrator ... is authorized to treat Indian Tribes as States" for groundwater and public drinking water protection programs.[42] That same year Congress authorized tribal "treatment as a State" for Superfund programs addressing cleanup of hazardous substances released into the environment and restoration of natural resource damages.[43] Congress authorized EPA in

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[38] Cover Memorandum, 1984 INDIAN POLICY, EPA Office of External Affairs 1 (undated) (on file with author).
[39] 1984 INDIAN POLICY, *supra* note __, at 2 (Principle 2).
[40] *Id.* at 3 (Principle 4).
[41] Memorandum from Cathy O'Connell & Mark Charles, Permits Div., Office of Water, to Betsy La Roe, Office of Water Enforcement & Permits 2 (Aug. 31, 1984) (on file with author) (recommending that the Office of General Counsel get serious about developing program by program amendments identified years earlier).
[42] Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, Title III, § 302(c), 100 Stat. 665 (June 19, 1986) (to be codified at 42 U.S.C. § 300j-11(a)).
[43] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, Title II, § 207(e), 100 Stat. 1706 (Oct. 17, 1986) (to be codified at 42 U.S.C. § 9626).

1987 to "treat an Indian tribe as a State" for the CWA's programs for surface water protection,[44] and in 1990 to "treat Indian tribes as States" for the Clean Air Act's programs for air quality management.[45]

Congress added these provisions relatively contemporaneously (within five years) in relatively similar programs (environmental regulatory and response). Yet, as Congress seems want to do, it used slightly different language in each statute without explanation. Nonetheless, the amendments explicitly created state-like environmental program roles for Indian tribes and so became known generally as tribal treatment as a state (TAS) provisions.[46]

Each TAS provision came with a set of threshold eligibility requirements. Some variance was necessary for these requirements because they applied to different programs. The language of requirements not specific to the various environmental programs generally required the tribe: (1) be federally recognized;[47] (2) have a governing body carrying out substantial governmental duties and powers; and (3) be capable, or

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[44] Clean Water Act Amendments of 1987, P.L. No. 100-4, Title V, § 506, 101 Stat. 76 (Feb. 4, 1987) (codified at 33 U.S.C. § 1377(e)).

[45] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Title I, § 107(d), 104 Stat. 2464 (Nov. 15, 1990) (to be codified at 42 U.S.C. §7601(d)).

[46] The origin of equating tribes with states for environmental program roles was nearly a decade earlier. In the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, title I, sec. 127(a), 91 Stat. 733 (Aug. 7, 1977) (to be codified at 42 U.S.C. § 7474(c)), Congress authorized tribes, like states, to redesignate the default air quality classification set for the CAA Prevention of Significant Deterioration program. Thus, "Indian tribes are given the same powers as States." S. RPT. No. 95-127, at 35 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1113. Congress' first official use of the "treatment as a state" formulation wasn't in the environmental context. *See* The Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97–473, § 202, 96 Stat 2605 (Jan. 14, 1983) (providing "[a]n Indian tribal government shall be treated as a State" for deductions for money transfers to and for tribal governmental use).

[47] Curiously, only the SDWA's TAS eligibility provision specifically requires tribes be federally recognized; none of the other TAS provisions list recognition as an eligibility requirement. EPA included that requirement as an eligibility requirement in all TAS programs because each of the other statutes *define* Indian tribes as those recognized by the Department of the Interior. *See* Superfund (the Comprehensive Environmental Response, Compensation & Liability Act), 42 U.S.C. § 9601(36), the Clean Water Act, 33 U.S.C. § 1377(h)(2), and the Clean Air Act, 42 U.S.C. § 7602(r).

reasonably expected to be capable, of carrying out the programmatic functions consistent with the statute and applicable regulations.[48] Each threshold eligibility provision also contained an additional requirement, discussed next.

B. EPA's First Interpretation: Tribes Must Show Inherent Jurisdiction

The additional threshold eligibility requirement set out in the CWA TAS provision said EPA could treat a tribe as a state only if:

> the *functions to be exercised* by the Indian tribe *pertain to the management and protection of water resources* which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or *otherwise within the borders of an Indian reservation*.[49]

For no obvious or expressed reason, the provision focused first on three categories of surface water ownership. That is odd because water ownership is most commonly associated with water rights—a form of property—and the legislative history of the TAS provision is clear Congress was concerned with water *quality* (which is the only concern of the CWA[50]), and had no intent to address water *quantity* or water rights.[51] The TAS provision's final phrase of waters "otherwise within the borders of an Indian reservation" is more appropriately divorced from ownership and clearly encompasses all reservation surface waters regardless of tribal, Indian or non-Indian ownership. Congress made even

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[48] *See, e.g.,* 42 U.S.C. § 7601(d)(2) (Clean Air Act).
[49] 33 U.S.C. § 1377(e)(2) (2015) (emphasis added).
[50] *Id.* at § 1251(a) (stating the policy of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"), and § 1251(g) (stating the policy of Congress that the CWA not supersede or abrogate rights to quantities of water established by States).
[51] *See, e.g.,* Revised Interpretation of Clean Water Act Tribal Provision, 80 Fed. Reg. 47,430, 47,434 (proposed Aug. 7, 2015) (noting the "bulk of [Section 518's] legislative history relates to the entirely separate issue of whether section 518(e) pertains to non-Indian water quantity rights, which it does not"); Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 6 4,880 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt.131) [hereinafter 1991 WQS Rule] (noting statements in the legislative record clarifying the CWA TAS provision was not intended "to affect existing water quantity rights").

clearer that water ownership was irrelevant inside reservations by the TAS provision's definition of Indian reservation: "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any [non-Indian] patent, and, including rights-of-way running through the reservation."[52]

So it was somewhat surprising when EPA proposed its first CWA TAS regulation, which happened to be for the WQS and section 401 Certification programs, the agency said "*only* where the tribe *already possesses* and can adequately demonstrate *[legal] authority* to manage and protect water resources within the borders of the reservation" could it receive TAS status.[53] The Supreme Court has never seriously questioned whether the inherent sovereignty of Indian tribes, which pre-existed the United States and did not derive from federal authority, extended to Indian citizens of the tribe and their lands (as well as tribal lands) within reservations.[54] EPA's reference, then, meant that tribes whose reservations included fee lands owned by *non-Indians* (presumably bordering surface waters) would have to show inherent jurisdiction over non-Indian water polluters.[55]

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[52] 33 U.S.C. at § 1377(h)(1) (quoting 18 U.S.C. § 1151(a), the first subcategory of "Indian country").
[53] Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,101 (proposed Sept. 22, 1989) [hereinafter 1989 Proposed WQS Rule] (emphasis added).
[54] *See e.g.,* United States v. Wheeler, 435 U.S. 313, 323 (1978) (upholding tribal jurisdiction over a tribal citizen who violated tribal criminal law saying that "tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory").
[55] Whether tribal jurisdiction over non-Indians was EPA's concern at this stage, numerous comments submitted on the proposed rule focused EPA attention on it, as evidenced by the relatively extensive analysis in the final rule's announcement. *See* 1991 WQS Rule, supra note __, at 64,877-64,880. Yet, it is odd that EPA accepted non-Indian jurisdiction as relevant to this proposal: WQS are not self-executing. They have legal effect only through a secondary vehicle, most commonly an NPDES discharge permit that bases legally enforceable conditions on WQS at the point of discharge or downstream. Hence, WQS are not "regulatory" in the traditional control and command context of environmental law. Similarly, section 401 certification is the tribe (or state's) confirmation a proposed permit will attain applicable WQS. Since the 1991 WQS Rule did not offer any permit authority to tribes, their jurisdiction over non-Indians (or anyone) on the reservation was irrelevant.

EPA's "analysis" supporting this new requirement was a single paragraph that made no reference to the CWA TAS statutory text. Instead, the agency referred to its TAS rulemaking the year before under the SDWA, where it rejected the suggestion of commenters that EPA presume all tribes have jurisdiction over all groundwater pollution sources within reservations; the final rule required each tribal applicant demonstrate its jurisdiction.[56] What EPA neglected to mention in the proposed CWA regulation was a critical distinction in the language of the SDWA's and CWA's TAS provisions. The SDWA's eligibility provision explicitly required tribes show "the [SDWA] functions to be exercised by the Indian Tribe are *within the area of the Tribal Government's jurisdiction*."[57] The CWA's eligibility provision, by contrast, did not even mention tribal jurisdiction. It required only that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources … within the borders of an Indian reservation."[58]

EPA's proposed regulation generated a modest 34 written comments.[59] Interestingly, six were from federal congresspersons asserting the CWA TAS provision they helped enact was or was not an express congressional delegation of jurisdiction over non-Indians on reservations to tribes.[60] I discuss EPA's treatment of delegation *infra* in Section III as a foundation for the agency's 2016 reinterpretation of the provision because in 1991

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[56] Safe Drinking Water Act—National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands, 53 Fed. Reg. 37,396, 37,399 (Sept. 26, 1988) (to be codified at 40 C.F.R. pts. 35, 124, 141, 142, 143, 144, 145, and 146)

[57] 42 U.S.C. § 300j-11(b)(1)(B) (emphasis added).

[58] 33 U.S.C. § 1377(e)(2).

[59] 1991 WQS Rule, supra note __, at 64,876. Twenty-five people also made oral comments at three regional hearings. EPA did not indicate how many of the oral comments were readings of written comments, as is common in administrative hearings. EPA suggested the "relatively few comments" submitted were due to pre-proposal tribal consultations where "many of the difficult issues were resolved." *Id.*

[60] *Id.*at 64,879-64,880 (Senators Alan Simpson, R-WY, Senator Max Baucus, D-MT, and Representative Bruce Morrison, D-CT).

EPA rejected delegation and instead like the SDWA required tribes show inherent sovereignty over all pollution sources on reservations for CWA TAS qualification.[61]

Most comments on jurisdiction and thus EPA's explanation in the final rule focused on two Supreme Court decisions related to tribal inherent sovereignty. The focus was on *Montana v. United States,*[62] which manufactured a new "general proposition" that tribes lack civil regulatory jurisdiction over nonmembers of the tribe within Indian country[63] because the "exercise of tribal power beyond what is necessary to protect tribal self-government … is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[64] Begrudgingly acknowledging contrary precedent, *Montana* said the new rule was subject to two exceptions.[65] One exception seemed perfectly suited to environmental management: a tribe can regulate the "conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health or welfare of the tribe."[66] Health and welfare is the common catchphrase for states' inherent, broad police powers.[67] The Court is typically quite deferential to states' decisions on subjects promoting their communities' general welfare, accepting for example, a state's assertion at the turn of the century that its bird-hunting laws were rationally related to preserving a common resource.[68]

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[61] *Id.* at 64,880.
[62] 450 U.S. 544 (1981).
[63] *Id.* at 565.
[64] *Id.* at 564.
[65] *Id.* at 565.
[66] *Id.* at 565-66 (citations omitted).
[67] *See, e.g.,* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 504 (1987) (quoting Home Building & Loan Ass'n v. Blaisdell et ux, 290 U.S. 398, 445 (1934)).
[68] Geer v. Connecticut, 161 U.S. 519, 534 (1896).

The *Montana* Court offered no deference to the Crow Tribe who enacted similar game management laws and sought to apply them to non-Indians on fee lands within the Crow Reservation. As stated, the Court's exception asked for proof only that the non-Indian conduct "threatens or has some direct effect" on the Tribe. But apparently something more, perhaps much more, was required than a bare threat or minor direct effect on tribal welfare. The Court criticized the United States, who sued on behalf of the Tribe, because it "did not allege that non-Indian hunting and fishing on fee lands *imperil* the subsistence or welfare of the Tribe."[69] The Court then pulled the curtain back further to reveal another unstated but now ominous threat to tribal jurisdictional claims: the State of Montana's prior regulation of non-Indians on fee lands on the Crow Reservation was evidence to the Court that tribal regulation was unnecessary to tribal self-governance.[70] The Court made no comment on and thus implicitly accepted the legitimacy of the state's regulatory intrusion into a federal Indian reservation without congressional authorization.

The second Supreme Court decision frequently mentioned in comments on EPA's proposed WQS rule was *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.[71] As the first Supreme Court case directly addressing tribal regulatory authority over non-Indian fee lands since *Montana*, and issued just months before EPA proposed its WQS regulation, *Brendale* could have provided clarity on the health and welfare standard.

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[69] 450 U.S. at 566 (emphasis added).
[70] *Id.* at 564-565, 564 n. 13, and 566. The Court implicitly elevated the significance of state regulatory creep into Indian country in a footnote again criticizing the United States' failure to anticipate this new factor. The Court said the complaint had not alleged the state's regulations or its past regulatory behavior was discriminatory, had abdicated or abused its management responsibility, or injured the Tribe's treaty rights. *Id.* at 566 n.16.
[71] 492 U.S. 408 (1989).

Instead, the Court split badly on whether the Yakama[72] Nation's zoning code applied to proposed housing development on two different parcels of non-Indian land within the Tribe's reservation. Four justices said no because the Tribe's dependent status precluded regulating non-Indians.[73] Three Justices said yes because on-reservation land development implicated the Tribe's health and welfare, particularly because of Indigenous peoples' cultural connection to their lands.[74] The remaining two Justices said the Tribe had jurisdiction over one parcel in an largely undeveloped area of tribal timber forest resources, but lacked jurisdiction over the other parcel in a mostly non-Indian part of the reservation.[75]

Some commenters on EPA's proposal felt *Brendale* left *Montana's* exceptions for tribal jurisdiction over non-Indian fee lands undisturbed. Others believed *Brendale* significantly undercut or even overruled *Montana's* exceptions. EPA took the easy out: without a majority opinion, *Brendale* had no real precedential value and certainly could not overrule existing precedent. EPA noted the Court's result, however, was consistent with *Montana*: the Tribe won (on a 5-4 vote) in the forested area where its welfare interests were most at stake, and lost (on a 6-3 vote) in the non-Indian community where arguably its interests were more tenuous.[76]

The tea leaves left scattered by *Brendale's* split opinions did offer hints for EPA. Justice White, who wrote for the four Justices against Yakama tribal regulation, suggested

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[72] At the time of the case, the United States and others spelled the name of the Tribe and its reservation Yakima. The Tribe later changed the spelling to Yakama.
[73] 492 U.S. at 414 (White, J.).
[74] *Id.* at 448 (Blackmun, J.).
[75] *Id.* at 433 (Stevens, J.).
[76] 1991 WQS Rule, supra note __, at 68,877.

Montana's health and welfare effects must be "demonstrably serious."[77] Justice Blackmun, who formed the three-Justice core favoring tribal jurisdiction, said the non-Indian activities should implicate "a significant" tribal interest.[78] EPA took note of the adjectives, as well as dicta from a recent criminal law decision that tribes may possess civil authority over non-Indians when its exercise was "vital" to tribal self-determination,[79] and sensed the Court's trend toward requiring the tribal impacts be "more than de minimis." EPA's final WQS rule thus included "an interim operating rule"[80] requiring tribes seeking TAS status submit a legal analysis showing the potential impacts of non-Indian water pollution were "*serious and substantial.*"[81]

Each tribe's TAS application would be evaluated individually, measuring the specific factual circumstances against the serious and substantial test. Each application would also be supplemented, first by EPA's expertise and experience with water quality management that recognized clean water and critical habitat are "absolutely crucial to the survival of many Indian reservations."[82] Second, TAS applications would be evaluated against a backdrop of "generalized findings" made by EPA on the relation of water pollution to human health and welfare:[83] the Clean Water Act itself constituted a legislative determination that water pollution presents serious and substantial impacts on public

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[77] 492 U.S. at 431 (White, J.).
[78] *Id.* at 450 (Blackmun, J.).
[79] *See* Duro v. Reina, 495 U.S. 676, 688 (1990) (citing Brendale).
[80] EPA did not explain why it labeled this eligibility requirement as an "interim operating rule." Its discussion of the cases did note the Supreme Court was "exploring" options for the Montana test but had not yet settled on one. 1991 WQS Rule, supra note __, at 68,878. The agency said it adopted the rule "solely as a matter of prudence in light of judicial uncertainty and [that it did] not reflect an Agency endorsement of [the] standard per se." *Id.* That comment clearly foreshadowed the agency's reinterpretation of the TAS provision in 2016, discussed *infra* in Section III.
[81] *Id.* (emphasis added).
[82] *Id.*
[83] *Id.*

health and welfare; the high mobility of water pollutants makes identifying water quality impairment caused by non-Indian pollution discharges difficult if not impossible; water movement also increases the possibility tribal citizens will be exposed to pollutants released from non-Indian lands; and Congress clearly preferred tribal water quality regulation on Indian reservations. Finally, EPA stated the obvious conclusion: "water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government."[84]

Supplemented by these findings of the expert environmental agency, EPA would presume a tribal applicant's legal analysis met EPA's *Montana* test if it made:

> [A] relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe.[85]

EPA said the presumption of tribal jurisdiction was rebuttable. The regulation created a new notice and comment process for adjacent states and tribes who could lodge a jurisdictional objection by proving that non-Indian water pollution *did not* present serious and substantial threats to tribal health and welfare.[86]

C. Legal Challenge to EPA's Operating Rule

The agency's translation of the *Montana* test into the CWA context clearly favored tribal primacy for CWA programs. Still, it was unusually honest for a federal agency to state so baldly the regulation's most controversial conclusion: "EPA believes ... there are

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[84] *Id.* at 68,879.
[85] *Id.*
[86] *Id.* at 68,896 (to be codified at 40 C.F.R. § 131.8(c)(2)(ii)).

substantial legal and factual reasons to assume that Tribes ordinarily have the legal authority to regulate surface water quality within a reservation."[87] That was surely a step further than EPA took the year before in its SDWA regulations when it "recognize[d] ... substantial support" for tribal jurisdiction across reservations.[88] But like the SDWA regulation that declined to "automatically assume" such tribal authority,[89] the final CWA regulation said EPA would *not* make a "conclusive statement" that tribes possessed jurisdiction over non-Indian fee lands.[90] Each tribal application would be scrutinized to ensure it met the interim operating rule's heightened standard of showing serious and substantial impacts from non-Indian pollution.

The ostensible rigor of that standard was thrown into question by EPA's explanation of the burden the interim operating rule put on tribes, *and* on their opponents. States were certainly not fooled. In later litigation over a particular tribal TAS application, eleven states filed an amicus brief asserting "EPA has concocted a simplistic, wooden formula under which no tribe could ever fail to receive state status under the Clean Water Act."[91] The states accused EPA of shifting the burden of proof established by the Supreme Court: instead of making tribes show jurisdiction over nonmembers, EPA allegedly required states prove the *absence* of tribal jurisdiction, a burden the states complained was "impossible" to

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[87] *Id.*

[88] Safe Drinking Water Act—National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands, 53 Fed. Reg. 37,396, 37,399 (Sept. 26, 1988) (to be codified at 40 C.F.R. pts. 35, 124, 141, 142, 143, 144, 145, and 146).

[89] *Id.*

[90] 1991 WQS Rule, supra note __, at 68,878. EPA ostensibly buttressed its CWA approach by noting it was "consistent' with its SDWA approach. *Id.* Again, however, the agency did not acknowledge the two statutes were not consistent on this key element: the SDWA TAS provision explicitly required a showing of tribal jurisdiction whereas the CWA TAS provision did not.

[91] Brief of Amici Curiae States of Arizona, California, Colorado, Florida, Idaho, Michigan, Nebraska, Nevada, South Dakota, Utah, and Wisconsin in Support of Petition for Writ of Certiorari 10-11, State of Montana v. United States Environmental Protection Agency, 137 F.3d 1135 (9th Cir. 1998) (No. 97-1929).

carry.[92] Oddly, though, no state or non-Indian organization challenged the final regulation when it became effective.

Instead, the regulation's legal validity was implicated nearly five years later when EPA approved the WQS of the Salish & Kootenai Tribes for the Flathead Indian Reservation in western Montana. The Reservation's distinguishing feature is Flathead Lake, the largest freshwater lake in the contiguous United States west of the Mississippi River.[93] The State of Montana operates a research facility on the Reservation that discharges pollutants into the Lake. Two Montana towns operate wastewater facilities on the Reservation that discharge pollutants into creeks downstream. Although the State's research facility and both towns are on the Reservation, and EPA had not authorized State implementation of the NPDES permit program there, all three facilities operated under state-issued permits.[94] Once the Tribes' WQS were approved, the State sued EPA because it feared it would need a federally-issued NPDES permit and the towns alleged EPA was requiring they get federal permits.[95]

Not only was that fear not a legal basis to question EPA's approval, it was illogical since the WQS program is separate from the NPDES permit program, and the approval of

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[92] *Id.*

[93] National Park Service Archeology Program: State Submerged Resource Laws (2019), https://www.nps.gov/archeology/SITES/stateSubmerged/montana.htm (last visited July 18, 2019).

[94] *See* State of Montana v. United States Environmental Protection Agency, 941 F.Supp 945, 947 (D. Mont. 1996).

[95] *Id.* The case was decided on summary judgment so the towns did not offer proof of such demands. EPA's answer to the State's complaint did allege the State's and the towns' compliance with the CWA required they obtain federally-issued NPDES permits. *See id.* at 948. That is the legally correct answer, but directly contradicted the agency's acknowledgment two years earlier that some states were issuing water discharge permits in Indian country without authorization, saying it "will, whenever possible, assume, without deciding" they contained enforceable limitations. *See* Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act, 58 Fed. Reg. 67,966, 67,964 (Dec. 22, 1993) (to be codified at 40 C.F.R. pts. 122, 123, 124 and 501). On the other hand, Montana lies within EPA's Region VIII that was then led by William Yellowtail, the Nation's first Indigenous Regional Administrator, whose informal policy was to replace state-issued NPDES permits on Indian reservations with federal ones *upon the request of the tribe*. Personal communication, circa 1997. EPA's response to the State's complaint apparently made no reference to a tribal request, nor a federal one. But EPA action blocking a proposed state permit within a reservation has been upheld. Michigan Dept. of Environmental Quality v. EPA, 318 F.3d 705 (6th Cir. 2003).

WQS has no bearing on which government implements the permit program.[96] Similarly irrational was the State's claim that EPA's approval subjected the State to Tribal regulation.[97] WQS are value judgments on the desired quality of water; they regulate no one. NPDES permits are regulatory, but the Tribes had not applied for TAS status for NPDES implementation; the State's permit would either remain issued by the State itself, or would be issued by EPA, not the Tribes. The State's third argument of questionable legal basis was that EPA's approval of the Tribes' section 401 certification authority along with its WQS somehow infringed on the State's certification authority.[98] Since the State never received section 401 certification authority on the Reservation, it was not possible to lose it. Appropriately, the court did not address these misguided attacks.

What the State was really after was made clear by the first sentence of the appellate decision after the State lost in the district court: "This case is a facial challenge to regulations the Environmental Protection Agency (EPA) promulgated under section 518(e) [the TAS provision] of the Clean Water Act."[99] In the district court, the Tribes argued the State's challenge nearly five years after promulgation was untimely.[100] Inexplicably, the court ignored that jurisdictional bar and analyzed the merits of the State's main complaint, again stated more clearly in the appellate decision: "Montana filed this action ... maintain[ing] that [EPA's WQS TAS] regulations permit tribes to exercise authority over

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[96] Additionally, the Tribes' WQS were "virtually identical" to the State of Montana's, *see* 941 F.Supp at 948 n. 1, so the water quality-related conditions in any federal permit were likely to be the same or very similar to those in the research facility's and town's existing state permits.
[97] 941 F.Supp at 947-948.
[98] *Id.* at 948.
[99] State of Montana v. EPA, 137 F.3d 1135, 1137-1138 (9th Cir.) [hereinafter Montana v. EPA], *cert. denied*, 525 U.S. 921 (1998).
[100] *Id.* at 948.

non-members that is broader than the inherent tribal powers recognized as necessary to self-governance."[101]

Historically, the federal judiciary has been less than solicitous for tribal claims of inherent sovereignty over non-Indians. Tribes are thus understandably wary of cases presenting such claims. The context here was significantly different because a federal agency's involvement opened the door for administrative law's core precept of judicial deference, which is never offered to tribes independently asserting jurisdiction over non-Indians.[102] In the district court, the parties' focus was on whether in promulgating the WQS TAS regulation, EPA properly interpreted *Montana* and *Brendale*.[103] EPA conceded it was not entitled to deference in analyzing the Supreme Court's federal common law for Indians.[104]

How EPA interpreted the CWA TAS provision in light of *Montana* and *Brendale* was a different matter: the district court would not review that action *de novo*, but simply ensure the agency's action was not arbitrary or capricious.[105] The court held EPA's factual findings that non-Indian pollution could have serious and substantial impacts on tribal health and

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[101] 137 F.3d at 1138 (citing Brendale and Montana).

[102] *See generally* JAMES M. GRIJALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTY (2008) (arguing the confluence of Administrative, Environmental and Indian Law presents the best opportunity for achieving environmental justice in Indian country).

[103] 941 F.Supp at 956.

[104] *Id.* On review, the Ninth Circuit explained "the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference ... [because federal Indian law] has nothing to do with its own expertise." 137 F.3d at 1140.

[105] 941 F.Supp at 956 (citing the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)). The APA's arbitrary or capricious test is the ubiquitous judicial standard for reviewing all manner of administrative agency actions. Here, however, the central issue was whether EPA properly interpreted the CWA's TAS provision as requiring tribes prove jurisdiction via its inherent sovereignty, and the proper federal Indian law test to do so. Those questions clearly implicate the quintessential administrative law rule of Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), which requires courts defer to reasonable agency statutory interpretations where Congress' intent is unclear. *Id.* at 843-844. On appeal, the Ninth Circuit applied Chevron in affirming EPA's approval of the Tribes' WQS pursuant to its interim operating rule. *See* 137 F.3d at 1140.

welfare were "entitled to substantial deference."[106] EPA's experience and expertise in making the generalized findings about the serious nature of water pollution were "not to be treated lightly,"[107] and the agency's reconciliation of environmental law with its Indian Policy by avoiding checkerboarding between Indian trust land and non-Indian fee land was entitled to deference.[108]

Montana fared no better in its appeal to the Ninth Circuit.[109] The State styled the issue presented as whether the district court erred in affirming EPA's "determination that the Tribes possess inherent sovereign authority *over the State of Montana* and various of its political subdivisions" for purposes of the CWA.[110] That characterization was quite exaggerated: EPA's approval of WQS gave the Tribes no regulatory authority over any dischargers on the Reservation. The State's substantive argument was a convoluted effort to extract from *Brendale's* split opinions a binding impact that either overruled or significantly revised *Montana*. Unfortunately for the State, an intervening unanimous Supreme Court decision made clear *Montana* was still good law.[111] The Ninth Circuit was unpersuaded by the State's attempt to convert into a rule Justice Steven's *Brendale* opinion insisting tribal inherent sovereignty over non-Indians was possible only where state or federal remedies were inadequate to alleviate threats to tribal welfare.[112] Two related federal Circuit cases supported EPA's view of tribal sovereignty over reservation water

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[106] 941 F.Supp at 957.
[107] *Id.* at 958.
[108] *Id.* at 958 (citing Wash. Dept. of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985)).
[109] Montana v. EPA, 137 F.3d 1135.
[110] Appellants' Opening Brief 2, State of Montana v. United States Environmental Protection Agency, 137 F.3d 1135 (9th Cir. 1998) (No. 96-35508) (emphasis added).
[111] *Id.* (stating Strate v. A-1 Contractors, 520 U. S. 438 (1997), "reaffirmed the vitality of Montana").
[112] *Id.* at 1140-1141.

pollution discharged by any source.[113] And finally, EPA's decision to adopt inherent tribal authority as the standard intended by Congress implicated judicial deference because the CWA's language and legislative history were not entirely clear.[114]

D. Why Aren't There More Tribal Water Quality Standards?

Of the 573 of federally recognized tribes,[115] EPA estimates about 300 have formal or informal reservations making them eligible for WQS TAS.[116] EPA's WQS TAS regulation became effective in 1991. Seven years later when the Ninth Circuit issued Montana v. EPA, thirteen tribes had EPA-approved WQS,[117] approximately four percent of potentially eligible tribes. By 2000, there were fifteen tribes with EPA-approved WQS.[118] By 2005, there were a total of 25,[119] about eight percent of eligible tribes. In 2010, 34 tribes had EPA-approved WQS.[120] In 2015, EPA reported 39 approved WQS tribes. Today, there are 45 tribes with approved WQS,[121] a mere fifteen percent of eligible tribes. Sixteen more tribes

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[113] *Id.* at 1141 (citing Confederated Colville Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981) noting waters are unitary resources where actions by one user have immediate and direct effects on others), and Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (affirming the authority of tribes to set more stringent WQS than adjacent states)).

[114] *Id.* at 1140 (citing Chevron, 467 U.S. at 843-844, holding the court's role where a statute is silent or ambiguous on the disputed issue, is to determine whether the agency's answer is based on a permissible construction of the statute and is not to substitute the court's view for the agency's).

[115] Notice, Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019).

[116] *See* Federal Baseline Water Quality Standards for Indian Reservations, 80 Fed. Reg. 66,900, 66,902 (advance notice of proposed rulemaking Sept. 29, 2016) (including formal reservations, Pueblos and informal reservations, which are lands held in trust by the United States for tribes that are not officially designated as reservations). The main reason for the disparity with the overall number of 573 federally recognized tribes is the Supreme Court's misguided decision in Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), which held that with one exception, the lands of the 229 Alaskan tribes are not reservations. *See* BIA's Overview of its Alaska Region, noting it serves 229 federally recognized tribes, *available at* https://www.bia.gov/regional-offices/alaska.

[117] *See* EPA table for tribal WQS TAS approvals at https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts (last visited February 9, 2020) [hereinafter WQS TAS Table]. One tribe, the Confederated Tribes of the Colville Reservation in Washington, has federally-promulgated WQS. *See id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

are approved "as states," but have not submitted WQS for EPA review.[122] Another ten have applications for basic TAS status under review.[123] History suggests it is unlikely those 26 tribes will develop and submit WQS to EPA for approval anytime soon, but if they did, and if EPA approved them expeditiously, then only 24% of eligible tribes would have legally enforceable tribal water quality value judgments under the CWA, 30 years after the opportunity to do so arose.

Why, for tribes who view the environment as central to their cultural identity[124] and know particularly that "water is life"[125] have so few developed WQS during those 30 years? To my knowledge, no formal survey has been done on why more tribes have not sought TAS for the WQS and section 401 certification programs, or for that matter any number of

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[122] *Id.* EPA's WQS TAS Table contains some but not all tribal applications and EPA decision documents. These give no indication of whether the tribes with TAS status are actively developing WQS. Ten of these fifteen tribes received TAS status in the last few years, so they may be developing their WQS now. Five of those tribes, though, were approved more than eight years ago, and one was approved over 20 years ago.

[123] *Id.*

[124] *See, e.g.,* AMERICANS FOR INDIAN OPPORTUNITY, HANDBOOK OF FEDERAL RESPONSIBILITY TO INDIAN COMMUNITIES IN AREAS OF ENVIRONMENTAL PROTECTION AND INDIVIDUAL HEALTH AND SAFETY 4 (1981):

> Indian people not only have a special relationship with the Federal government, but also with the environment. The land, the air, the water, the wildlife, the river and sealife, and the plantlife—all are important to Indian people, not only for esthetic values but also for religious reasons. Indian lands have diminished to a fraction of what they originally were, and these remaining reservations are the only ones for the future. The quality of the environment, then, is extremely important. Indian people cannot sell these lands once they become polluted and move elsewhere. The importance of the environment cannot be thought of in terms of singular issues and actions, but rather as a "whole." This "whole" defines Indian people. Consequently, separation of one ingredient; culture, religion, environment, and development cannot be successfully achieved without adversely affecting reservation and community life.

[125] *See* comment of Ken Norton, Chairman, National Tribal Water Council, to Danielle Anderson, US EPA HQ 2 (2015) (quoting a Water Prayer from the East: "We give thanks to all the waters of the world for quenching our thirst and providing our strength. Water is Life."). In 2016, "Water is Life" became a rallying cry for some 10,000 Indigenous and other people non-violently opposing the construction of an oil pipeline just upstream of the Standing Rock Indian Reservation in North Dakota. The protest, and the parallel litigation by two Sioux tribes against the Corps of Engineers is briefly described in Robert T. Anderson, *Indigenous Rights To Water & Environmental Protection*, 53 HARV. C.R.-C.L. L. REV. 337, 367-375 (2018). *See also* Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens To Effectively View Environmental Threats To Indigenous Survival*, 26 Transnat'l L. & Contemp. Probs. 343, 355-365 (using the controversy as a case study that demonstrates how specific environmental challenges indigenous communities face may be viewed through an environmental justice lens).

other federal environmental programs available to them. Common sense screams that the historical reality of 200-plus years of genocide, relocation, assimilation, long pervasive federal control over all aspects of Indian life, and misguided attempts to remake tribal governments in Euro-American models make it obvious that tribes face an incredible uphill struggle to realize self-determination in any genuine sense.[126] Any real chance of tribal success would likely depend on assistance from federal partners. EPA's Indian Policy essentially acknowledged all of this, albeit generally:

> It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations *cannot be accomplished immediately*. Effective implementation will *take careful and conscientious work* by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be *necessary to proceed in a carefully phased way,* to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles.[127]

Commenters and tribes have offered more specific possible explanations for the continuing water quality gap in Indian country, all facially reasonable, and none supported by empirical data. Two are closely related and follow from the history noted above: tribes generally lack the financial and human resources to manage environmental programs,[128] and EPA offers insufficient financial and technical resources to build tribal capacity.[129] In

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[126] Against that backdrop, it is amazing the programmatic successes many tribes have achieved in a broad variety of areas like housing, education, health, economic development, criminal enforcement, judicial systems, utilities, and a host of others.

[127] 1984 INDIAN POLICY, *supra* note __, at 1 (emphasis added). Relevant to this discussion is the reality it took EPA eleven years just to adopt an official cross-program agency-wide policy promising respect for tribal self-determination. *See* James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J. L. & PUB. POL. 191, 205-277 (2006) [hereinafter Grijalva, *Origins of EPA's Indian Program*], and another ten years to begin implementing it in earnest.

[128] *See, e.g.,* 2016 Baseline WQS Proposal, 81 Fed. Reg. at 66,902 (noting some tribes have not developed WQS for lack of resources).

[129] *See, e.g.,* Tom Goldtooth, Indigenous Nations: Summary of Sovereignty and Its Implications for Environmental Protection, in Environmental Justice: Issues, Policies, and Solutions, 138 (Bunyan Bryant ed., 1995) (implying EPA's underfunding of tribes is a key factor in environmental injustice).

light of longstanding and varied federal efforts dismantling traditional Indigenous governance systems, many tribes today lack a foundation of governmental infrastructure for building effective environmental programs. One basic example of that is the lack of administrative procedures laws guiding tribal agencies as they implement their various programs.[130] Compounding the lack of general infrastructure is the frequent turnover of Tribal Council members, resulting in a parade of leaders unfamiliar with the significant benefits (and challenges) of TAS, and technical staff who seem to leave or move to other positions just as they become knowledgeable about environmental programs.

Occasionally a commenter will suggest generally that western environmental law is simply inconsistent with Indigenous cultural values,[131] or that tribal state-like roles are arguably just another extension of colonialism.[132] These are fair positions, although the former are typically expressed in the limited context of the shortcomings of environmental impact statements under the National Environmental Policy Act, and the latter often generalize tribal TAS roles in ways that do not fully capture the complex nature of environmental federalism. Contrary positions are also offered, suggesting perhaps an

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[130] *See* Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L. J. 1 (1999) (discussing reasons why administrative public participation rules and due process matter for tribes that become involved in American environmental federalism, and considering ways tribes might incorporate culturally important interests in them).

[131] *See, e.g.,* Robert Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994) (arguing that western environmental law is incapable of accounting for Indigenous visions of environmental justice).

[132] *See, e.g.,* Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?*, 19 J. NAT. RESOURCES & ENVTL L. 25 (2004-05) (questioning whether a court decision upholding stringent conditions imposed by EPA on an upstream, off-reservation pollution source, on the basis of federally-approved tribal WQS designed to protect cultural interests promoted or eroded tribal sovereignty); Darren J. Ranco, *Models of Tribal Environmental Regulation: In Pursuit of a Culturally Relevant Form of Tribal Sovereignty*, Fed. Law., Mar.-Apr. 2009, at 46, 48 ("TAS status ... appears to augment the authority of tribes but, in fact, diminishes tribal sovereignty.").

imperfect but functional blending of ancient traditions and duties with modern limitations on true sovereignty.[133]

Rarely stated explicitly, but exceptionally clear to tribal environmental[134] and EPA attorneys, fear of litigation consistently gives tribes and EPA pause. After two hundred years, some states still resent the presence of Indian country within their borders and their limited authority there, and robotically react to tribal exercises of governmental authority with taxpayer-funded lawsuits. Non-Indian industry presumably cares little for the integrity of state sovereignty, but perhaps its comfort with state politicians and their tendency to favor economic development over environmental protection immediately causes disquiet at the first hint of federal or tribal regulation and provokes suit.

Tribal and EPA fear of litigation is thus well founded against a long history of legal challenges to tribal jurisdiction over non-Indians.[135] Yet, on the narrow question of tribal jurisdiction under the CWA WQS and section 401 certification programs, *Montana v. EPA* should have significantly assuaged that fear. EPA's interim operating rule offered tribes the safest jurisdictional harbor available short of congressional delegation. The unique

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[133] *See, e.g.,* Dean B. Suagee, *Tribal Self-Determination And Environmental Federalism: Cultural Values As A Force For Sustainability*, 3 Widener L. Symp. J. 229, 234 (1998) (noting when tribes "become engaged in environmental federalism, they do not act exactly like state governments [because] protecting the land and its biological communities tends to be a prerequisite for cultural survival"); Rebecca Tsosie, *Tribal Environmental Policy In An Era Of Self-Determination: The Role Of Ethics, Economics, And Traditional Ecological Knowledge*, 21 Vt. L. Rev. 225, 226 (1996) ((noting "because of the Indian nations' status as "domestic dependent nations," tribal environmental policy is to some extent contingent upon Anglo-American norms. Yet the traditional systems of decision-making and normative frameworks for determining appropriate human conduct toward the environment remain").

[134] *See* Dean B. Suagee, *The Tribal Right To Protect The Environment*, 27-FALL Nat. Resources & Env't 52, 53 (2012) (describing the trend in the Supreme Court of restricting tribal sovereignty through the "implicit divestiture" concept allowing the Court to decide whether a particular governmental power is appropriate or should be implicitly taken by courts, articulated in the recent era by Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) as a main reason so few tribes have sought TAS status). My experience over thirty years working with some 70 tribes as an attorney, consultant and collaborator in a variety of settings addressing a wide spectrum of environmental issues confirms anecdotally many of the foregoing reasons, especially anxiety for provoking litigation.

[135] Of particular concern is the risk of judicial diminishment discussed in Section III *infra*.

combination of Administrative, Environmental and Indian Law convinced the Ninth Circuit the operating rule reasonably applied the Supreme Court's *Montana* test in the context of CWA regulation. This was of course only one decision in one federal appellate circuit. Yet, the Ninth Circuit is an important one for Indian law,[136] and the Supreme Court denied certiorari for the case.[137] Additionally, even though the *Montana v. EPA* district court and Ninth Circuit wrongly overlooked the Statute of Limitations on challenging the regulation directly, as each year passed the chance a different circuit court would review the regulation's standard for tribal jurisdiction over non-Indians faded.

Also relevant for tribes who partner with EPA in the cooperative federalism mode for environmental management is the reality that state and non-Indian lawsuits name EPA as the sole or lead defendant, not the tribe.[138] Their legal challenge is most commonly a federal administrative law claim alleging EPA wrongly treated the tribe as a state for some program; for instance, approving a particular tribe's WQS or air quality redesignation.[139] So

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[136] Both by geographic expanse and by number of states, the Ninth Circuit is the largest circuit in the country. In addition to Montana, it encompasses most of the western continental states—Washington, Oregon, California, Arizona, Nevada and Idaho—as well as Alaska and Hawaii. With large populations of indigenous peoples in each of those states, Ninth Circuit cases account for a significant portion of federal Indian law decisions. Ninth Circuit panels previously decided the first two Indian country environmental regulatory cases. *See* Nance v. EPA, 645 F.2d 701 (9th Cir.) (upholding EPA's approval of a tribal air quality redesignation for its reservation), *cert. denied sub nom.*, Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981), and Wash. Dept. of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985) (upholding EPA's refusal to delegate Indian country hazardous waste management primacy under the Resource Conservation & Recovery Act to a state). The results of both cases were consistent with the Ninth Circuit's reputation for favorable treatment of Indian claims.

[137] *See* 525 U.S. 921 (1998). Yet, the Ninth Circuit has a history of its Indian cases being overturned by the Supreme Court: the tribes' key losses in Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) (judicially divesting tribal sovereignty over non-Indian criminal actions), Montana (judicially divesting tribal sovereignty over non-Indian hunting and fishing on reservation fee lands), and Brendale (judicially divesting tribal sovereignty over non-Indian land development on certain reservation fee lands) had been victories in the Ninth Circuit.

[138] *See, e.g.,* Nance v. EPA, 645 F.2d 701 (9th Cir.), *cert. denied sub nom.*, Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981), and Wash. Dept. of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985).

[139] *See, e.g.,* Montana v. EPA, supra note __; Arizona v. EPA, 151 F.3d 1205 (9th Circuit 1998).

EPA bears the burden of funding and staffing those cases.[140] The suit might focus on EPA's process completely apart from the tribe's substantive program,[141] or it might implicate directly the tribe's process[142] or substantive program.[143] Regardless, losing the suit primarily means the tribe's program would no longer be approved—exactly the Indian country regulatory gap status that existed before the tribe sought primacy.[144]

When EPA wins TAS-related suits, as it has done a significant majority of the time, the tribe's program then has the same legal consequences as similar state programs. For example, EPA's win in *Montana v. EPA* made the Salish & Kootenai Tribes' water quality value judgments enforceable under federal law.[145] Every federal license and permit issued on the reservation by a federal agency must now contain conditions ensuring compliance with the tribe's WQS.[146] The Tribes' section 401 certification authority ensures that result as it rests upon the Tribes' not the federal agency's assessment of the discharge's impact on the tribe's WQS.[147] The permit conditions required for compliance with the tribe's WQS

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[140] Tribes are sometimes named as additional defendants, *See, e.g.,* Montana v. EPA, supra note __, or intervene as defendants representing their programs, *see e.g.,* Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001). In either case, the substantive burden and cost of these roles is nowhere near that borne by EPA.

[141] *See, e.g.,* Arizona v. EPA, 151 F.3d 1205 (9th Circuit 1998) (addressing use of a federal Implementation Plan to make a tribal redesignation effective).

[142] *See, e.g.,* Arizona v. EPA, 151 F.3d 1205 (addressing tribe's analysis supporting redesignation)

[143] *See, e.g.,* Albuquerque v. Browner (addressing whether tribe's stringent WQS were attainable).

[144] A critical exception is the risk of a diminishment claim, discussed in Section III.B.3 *infra*.

[145] EPA approval is presumably irrelevant to whether tribal WQS would be enforceable under tribal law. Depending upon a particular tribe's water quality program and background tribal law, tribal WQS could be enforced through a tribal permit condition or other mechanism without EPA involvement. There should be no question the tribe's inherent sovereignty would apply to an individual tribal citizen's or tribal facility's water polluting activities. This is arguably reason enough why even tribes with heavily checkerboarded reservations might consider developing WQS apart from the question of using them via EPA approval and involvement to control non-Indian water polluting activities.

[146] 33 U.S.C. § 1341(a)(1).

[147] *Id.*; 40 C.F.R. § 124.51(c).EPA also has an independent duty to ensure such compliance. *See* 33 U.S.C. § 1341(b)(1)(C) (permitted discharges must achieve any more stringent standard necessary to attain WQS adopted under state law pursuant to section 510); 40 C.F.R. § 122.4(a), (d) (NPDES permits must ensure the attainment of applicable WQS of all "affected states"); 1991 WQS Rule, supra note __, at 56 Fed. Reg. 64,890 (tribes approved under the CWA TAS provision are "affected states").

also rest in the Tribes' discretion; EPA has no authority to reject or revise them[148] even if the agency believes the conditions are more stringent than necessary for WQS compliance.[149] Discharges in violation of water quality conditions in permits are subject to enforcement by EPA[150] as well as by affected citizens.[151] Also potentially impactful for some tribes, the Superfund statute requires EPA ensure any remedial cleanup that leaves hazardous substances onsite attain tribal WQS.[152]

Even more critically for some tribes, EPA's approval of tribal WQS creates a buffer of sorts protecting tribal waters from upstream, off-reservation pollution sources. Like states, tribes with WQS more stringent than the upstream jurisdiction are protected by EPA's insistence NPDES permits contain conditions attaining the downstream standards.[153] Because of judicial deference to EPA's environmental expertise, courts are hesitant to

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[148] *See, e.g.,* Lake Erie v. Army Corps of Engineers, 576 F.Supp. 1063, 1074 (W.D. PA 1981) (holding certification is the state's exclusive prerogative); Mobil Oil Corp. v. Kelley, 426 F.Supp. 230, 234-235 (S.D. Ala. 1976) (determining Congress intended states play a paramount role in certification).

[149] *See, e.g.,* Roosevelt Campobello Int'l Park Comm'n v. 684 F.2d 1041 (1st Cir. 1982) (finding EPA has no authority to determine if state levels are more stringent than necessary).

[150] 33 U.S.C. § 1319(a)(1).

[151] *Id.* at § 1365(a)(1). Such "citizen suits" against violators on and near reservations holds programmatic potential for tribes beyond the direct impact of halting illegal water discharges. *See* James M. Grijalva, *The Tribal Sovereign as Citizen: Protecting Indian Country Health and Welfare Through Federal Environmental Citizen Suits,* 12 Michigan J. of Race & L. 33 (2006) (arguing tribal environmental citizen suits are sovereign actions protecting tribal health and welfare without risking adverse judicial decisions, and provide opportunities for building regulatory capacity).

[152] 42 U.S.C. § 9621(d)(2)(A) (treating CWA WQS as "legally applicable or relevant and appropriate standard[s]" (ARARs) for determining the level of cleanup for remedial actions that leave hazardous substances onsite). Again, tribal environmental capacity is important here in ensuring EPA has notice of tribal WQS that should or could be considered ARARs. *See* Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status Pilot 1 (Oct. 20, 2017) (stating "the state [or tribe treated as a state] is responsible for identifying state [or tribal] ARARs and communicating them to EPA in a timely manner").

[153] *See, e.g.,* Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997). A similar situation can occur in the CAA. *See also* Nance v. EPA, 645 F.2d 701 (9th Cir.) (upholding EPA's approval of a tribe's reclassification of its airshed, leading to new permit conditions imposed on an upwind facility off-reservation), *cert. denied sub nom.*, Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981).

second guess its approval of standards even when they appear extremely stringent.[154] And the possibility such WQS might impact economic development in the upstream jurisdiction is not a legal basis for EPA to disapprove of the standards or for a court to vacate EPA's approval of them.[155]

III. EPA'S 2016 REINTERPRETATION OF THE CWA TAS PROVISION

Two decades after EPA established the process for approving tribal WQS under the CWA, only 36 tribes or about 12% of those eligible had sought and received EPA approval of tribal WQS.[156] The obvious inequity caught the attention of Lisa P. Jackson, EPA's only Administrator who has seriously addressed environmental justice, announcing in 2011 among efforts to improve the TAS process consideration of interpreting the CWA TAS provision as a congressional delegation.[157] In 2013, the National Tribal Water Council[158] threw its weight behind congressional delegation, pointedly noting tribes were *not* being

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[154] *See, e.g.,* Albuquerque v. Browner, 865 F. Supp. 733, 741-42 (D. N.M. 1993) (upholding EPA approval of tribal WQS the court found "troubling" because of these extreme stringency), *aff'd*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

[155] *See* Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (affirming EPA's approval of the v Chippewa Community's WQS despite the possibility of upstream, off-reservation impacts on state-approved mining), *cert. denied*, 535 U.S. 1121 (2002).

[156] *See* WQS TAS Table, *supra* note __.
EPA Actions on Tribal Water Quality Standards and Contacts, https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts.

[157] *See* Plan EJ 2014 Legal Tools 79 (Dec. 2011), available at http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/ej-legal-tools.pdf. This document was unprecedented in publicizing legal tools available for communities seeking EJ. It appropriately addressed the unique legal context of Indian country separately, but the accompanying strategic plan was also unprecedented in its inclusion of tribal communities throughout the agency's priorities, plans and initiatives. *See* EPA Plan EJ 2014 (Sept. 2011), available at https://nepis.epa.gov/Exe/ZyPDF.cgi/P100DFCQ.PDF?Dockey=P100DFCQ.PDF.

[158] The Council is a technical, scientific body created to assist EPA, tribes and tribal organizations with research and information for decision-making on water-related issues and concerns impacting Indian communities. *See* http://www7.nau.edu/itep/main/ntwc.

treated the same as states because of the jurisdictional requirement, which the Council asserted was preventing tribes from developing WQS.[159]

One year later, EPA notified tribes it was initiating consultation procedures on a possible reinterpretation of the CWA TAS provision.[160] Although not noted, that action was the most recent manifestation of the agency's 30-year old policy commitment to "take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs."[161] A more significant omission, and one inconsistent with EPA's policy commitment to "assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands,"[162] was the lack of any substantive information to help tribes prepare for consultation. Congressional delegation is arguably a more straightforward legal issue than inherent tribal jurisdiction, but EPA didn't even remind tribes of its 1991 delegation analysis in the original tribal CWA WQS TAS rule.[163]

A. EPA's Rejection of Delegation in the 1991 WQS Rule

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[159] *EQUAL TREATMENT FOR TRIBES IN SEEKING ELIGIBILITY UNDER EPA REGULATORY PROGRAMS* 1-2 [hereinafter *EQUAL TREATMENT FOR TRIBES*]. This document is unattributed and undated. EPA reports receiving it from the National Tribal Water Council in 2013. *See* Revised Interpretation of Clean Water Act Tribal Provision, 80 Fed. Reg. 47,430, 47,436 (proposed Aug. 7, 2015).

[160] Letter from Elizabeth Southerland, Director, Office of Science & Technology, to Tribal Leaders 1 (April 18, 2014) (stating EPA's reconsideration would focus on whether the CWA TAS provision was a congressional delegation to tribes of jurisdiction over non-Indians, and if so, such reinterpretation of the Act would replace the existing requirement that tribes show inherent jurisdiction over non-Indians, which "could reduce some of the time and effort for tribes submitting TAS for regulatory programs under" the CWA).

[161] 1984 INDIAN POLICY, *supra* note __, at 3 (from the Title of Principle 4). It was also consistent with emerging principles of international law under the United Nations Declaration on the Rights of Indigenous Peoples. *See* Suagee, *A Human Rights-Based Environmental Remedy*, 29-SUM Nat. Resources & Env't at 3 (arguing how the policies of the allotment era and their effects violate international human rights norms and calling for federal legislation affirming tribal environmental jurisdiction over non-Indians in Indian country to address them).

[162] *Id.* at 2 (from the explanatory text of Principle 3).

[163] 1991 WQS Rule, *supra* note __.

In proposing the 1989 TAS rule, EPA did not mention delegation as a basis for tribal jurisdiction over non-Indians for the water quality standards and section 401 certification programs. The concept was implicitly raised and rejected in a single unanalyzed assertion: "The Clean Water Act authorizes use of existing Tribal regulatory authority for managing EPA programs, but i*t does not grant additional authority to Tribes.*"[164] Congressional delegation nonetheless became a substantive issue during the comment period on the proposed rule due in part, ironically, to letters submitted by six congressional members. Two senators and a congressman agreed with EPA that the CWA TAS provision was *not* intended to enlarge tribal jurisdiction (and was thus not a delegation).[165] Making an otherwise relatively dry administrative process more dramatic, three other senators took the opposite view, arguing Congress intended the TAS provision as a delegation of jurisdiction to tribes over non-Indian water polluters.[166]

Two of those latter senators held key positions for EPA's Indian program. Daniel Inouye, a Democrat from Hawaii, was Chairman of the Senate Select Committee on Indian Affairs. John McCain, a Republican from Arizona, was Vice-Chair. Three months before EPA proposed the WQS regulation in 1989, Inouye and McCain had called an historic first oversight hearing on the implementation of EPA's 1984 Indian Policy.[167] Inouye's introductory remarks said he convened the hearing because "of deep concerns expressed

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[164] 1989 Proposed WQS Rule, *supra* note __, at 39,101.
[165] 1991 WQS Rule, *supra* note __, at 64,879-64,880 (comments of Senators Alan Simpson, R-WY, Senator Max Baucus, D-MT, and Representative Bruce Morrison, D-CT).
[166] *Id.* at 64,879-64,880 (comments of Senators Daniel Inouye, D-HI, John McCain, R-AZ, and Quentin Burdick, D-ND).
[167] Administration of Indian Programs by the Environmental Protection Agency: Hearing Before the Sen. Select Comm. on Indian Affairs, 101st Cong., S.Hrg. 101-412 (June 23, 1989). Vice-Chair McCain praised Inouye for convening the hearing as "[n]o committee of the Congress has *ever* inquired into these matters." *Id.* at 3 (emphasis added).

throughout Indian country about ... the widely held perception that not enough is being done to address environmental problems on Indian lands."[168] McCain followed, noting numerous complaints by tribes that federal agencies like EPA, the Bureau of Indian Affairs and the Indian Health Service were not addressing serious environmental threats to reservation environments, and that many tribal governments had indicated a need for federal assistance in developing tribal capacity for building and operating effective environmental regulatory programs.[169] After hearing testimony from EPA and other federal officials, and detailed comments on one tribe's challenges working with EPA on several environmental issues, Inouye opined there was "ample justification to be critical of EPA and BIA and IHS on matters of [Indian country] environmental quality," and stated oversight of these issues would become "a routine part" of the Senate Select Committee's work.[170]

Two months later EPA proposed its WQS and 401 Certification regulation,[171] prompting Inouye and McCain's letter submitted during the rulemaking comment period stating that Congress intended the CWA TAS provision as a delegation of tribal jurisdiction over non-Indians.[172] But post-enactment statements by congressional members are not contemporaneous legislative history, and the D.C. Circuit had just that year cautioned EPA about relying on them.[173] EPA reviewed comments made by Inouye and others during the

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[168] *Id.* at 1.
[169] *Id.* at 2.
[170] *Id.* at 21. Regrettably, that promise (or veiled warning) did not come to pass. The Senate Select Committee has not reconvened on either EPA's general implementation of federal environmental programs in Indian country nor on EPA's implementation of its Indian Policy seeking delegation of those programs to tribes for implementation.
[171] 1989 Proposed WQS Rule, supra note __.
[172] 1991 WQS Rule, *supra* note __, at 64,879-64,880.
[173] *See, e.g.,* Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (D.C. Cir. 1989), *cert denied*, 111 S.Ct. 139 (1990).

committee hearing and found them arguably supportive but inconclusive.[174] Other commenters noted Justice White's plurality opinion in *Brendale* cited the CWA TAS provision as an example of an express congressional delegation.[175] White's opinion, however, represented the view of four Supreme Court justices, not a majority, and the case concerned tribal zoning authority not water quality regulation. So the TAS provision was not at issue in *Brendale*, and White had not analyzed the "somewhat confusing" CWA legislative history.[176] Oddly, EPA did not note or analyze the sole Supreme Court decision directly addressing congressional delegations to tribes of jurisdiction over non-Indians.[177]

Ultimately, EPA concluded that "expansion" of tribal authority over non-Indians was of such importance that had Congress desired delegation it "probably" would have drafted appropriate statutory language.[178] EPA thus opted, "in an abundance of caution,"[179] not to interpret the TAS provision as a congressional delegation, at least "pending further judicial or congressional guidance."[180] That did not mean tribes could not receive CWA primacy like states; it just required tribes demonstrate their inherent sovereignty over non-Indian water polluters under EPA's operating rule.[181]

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[174] 1991 WQS Rule, *supra* note __, at 64,880.
[175] 492 U.S. 408, 428 (1989) (White, J.).
[176] 1991 WQS Rule, *supra* note __, at 64,880.
[177] *See* United States v. Mazurie, 419 U.S 544 (U.S. 1975) (holding Congress delegated to tribes jurisdiction over non-Indian liquor retailers on reservations).
[178] EPA did not say what statutory language it needed. Again, Mazurie would have provided a quick example: the standard Indian country definition—all land within a reservation, "notwithstanding the issuance of any [non-Indian] patent"—made Congress' delegation intention clear for tribal liquor regulation over non-Indians. *Id.* at 548.
[179] Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183, 30,186 (May 16, 2016) (to be codified at 40 C.F.R. pts. 123, 131, 233 and 501) [hereinafter 2016 TAS Reinterpretation].
[180] 1991 WQS Rule, *supra* note __, at 64,877-64,878.
[181] *See* Section II.B, *supra*. Several commentators criticized that decision. *See, e.g.,* Jessica Owley, *Tribal Sovereignty over Water Quality*, 20 J. LAND USE & ENVTL. L. 61, 62-63 (2004) (arguing the CWA TAS provision is a clear congressional delegation); Regina Cutler, *To Clear the Muddy Waters: Tribal Regulatory Authority Under Section 518 of the Clean Water* Act, 29 ENVTL. L. 721, 738 (1999) (arguing the first court addressing EPA's interpretation should have held the provision a clear congressional delegation). Professor Alex Tallchief Skibine made the intriguing argument that EPA should have resolved the CWA's ambiguity by

B. EPA's 2016 Reinterpretation of the CWA TAS Provision

Twenty-four years later, with so few tribes TAS-approved, EPA set out to reduce the real or perceived burden of meeting the *Montana* test. In 2015, EPA proposed and sought comment on an interpretive rule finding the CWA TAS provision constituted a congressional delegation to tribes of water quality jurisdiction over non-Indians.[182] The agency began with a refreshingly honest, albeit striking, admission: "Waters on *the majority of Indian reservations do not have water quality standards* ... to protect human health and the environment."[183] EPA did not admit the obvious reality that this huge gap was an environmental justice issue of the highest magnitude: while not all tribes face serious risks from hazardous waste or air pollution or underground injection of toxic wastes, all tribes depend on and use surface waters in a variety of ways indispensable to tribal citizens' health, culture, spirituality and religion, and yet only a tiny portion of those uses are currently protected by specifically designed WQS.

The proposal was titled Revised Interpretation of the TAS provision, but its text repeatedly used the more accurate term reinterpretation, reflecting the agency's complete about face from the 1991 WQS Rule.[184] EPA reprised its reasoning in 1991 for not interpreting the provision as a congressional delegation, although with a distinct tone suggesting more substantive support for delegation than the agency perhaps admitted in

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invoking the Indian canon of construction to find congressional delegation. *See* Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act,* 11 ST. THOMAS L. REV. 15 (1998).

[182] Revised Interpretation of Clean Water Act Tribal Provision, 80 Fed. Reg. 47,430 (proposed Aug. 7, 2015) [hereinafter 2015 Proposed TAS Reinterpretation].

[183] *Id.* (emphasis added).

[184] *Id.* at 47,430, 47,431, 47,432, 47,434, 47,436, 47,438, 47,439, 47,441. Even the proposal's electronic contact address reflected this perspective: TASreinterpretation@epa.gov.

1991. EPA noted it took the "cautious approach" in 1991 of relying on tribal inherent sovereignty instead of delegation, but had also stated it "would await further congressional or judicial guidance" on whether a delegation interpretation would be proper.[185]

1. Congressional Delegation of Non-Indian Jurisdiction

That guidance had come, EPA asserted in 2015, in the form of several "significant developments" since 1991 supporting delegation. The first cited was not the first chronologically but was arguably the most supportive. In 1996, a federal district court rejected the State of Montana's challenge to EPA's approval of WQS submitted by the Confederated Salish and Kootenai Tribes of the Flathead Reservation.[186] The court found EPA's operating rule for showing tribal inherent jurisdiction over non-Indian water polluters on the reservation reasonably applied the *Montana* test to the CWA TAS context, and that the agency appropriately determined the Tribes' application met the agency's rule.[187] Since the case turned on tribal inherent sovereignty, congressional delegation was irrelevant and yet the court's attention to that topic was piqued by an amicus argument

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[185] 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,877-64,881. Apart from the alleged significant developments, EPA also noted it had prevailed in four cases under the inherent sovereignty approach: Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (affirming EPA's approval of the Sokaogon Chippewa Community's WQS despite the possibility of upstream, off-reservation impacts on state-approved mining), *cert. denied*, 535 U.S. 1121 (2002); Montana v. EPA, *supra* note __, (affirming EPA's approval of the Confederated Salish and Kootenai Tribes of the Flathead Reservation's WQS in face of possible impacts on facilities of the state and its subdivision), *cert. denied*, 525 U.S. 921 (1998); Montana v. EPA, 141 F.Supp.2d 1259, (D. Mont. 1998) (affirming EPA's approval of the Assiniboine and Sioux Tribes of the WQS of the Fort Peck Reservation); and Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (affirming EPA's approval of the Isleta Pueblo's extremely stringent WQS in context of EPA using them to apply new permit conditions to off-reservation city), *cert. denied*, 522 U.S. 965 (1997).

[186] Montana v. EPA, 941 F.Supp. 945 (D. Mont.) [hereinafter Salish & Kootenai] (upholding EPA's approval of the WQS of the Confederated Salish and Kootenai Tribes of the Flathead Reservation), *aff'd*, 137 F.3d 1135 (9th Cir. 1996), *cert. denied*, 525 U.S. 921 (1998).

[187] Salish & Kootenai, 941 F.Supp. at 955-954.

offered by the Assiniboine & Sioux Tribes of the Fort Peck Reservation also in Montana, whose own WQS TAS application was then pending.[188]

The court's analysis of that extraneous issue was succinct but persuasive. It noted (but did not analyze) the U.S. Supreme Court case EPA overlooked in the 1991 rule, *United States v. Mazurie*,[189] which held Congress could validly delegate to tribal governments regulatory jurisdiction over non-Indians on fee lands within Indian reservations.[190] The district court found plain evidence of such a delegation in the simple logic of combining two subparts of the TAS provision: the definition of Indian reservation that expressly included *all* reservation lands by citing the classic "notwithstanding" proviso of the Indian country definition,[191] and the TAS eligibility criterion for tribal regulatory authority over (all) waters "otherwise within the borders of an Indian reservation."[192] The court noted Justice White (and three other Justices) came to the same conclusion in *Brendale*, citing the CWA TAS provision as an express congressional delegation.[193] Finally, the Montana district court recognized delegation "comports with common-sense for it seems highly unlikely" Congress intended tribal WQS apply only to water segments appurtenant to Indian lands

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[188] *Id.* at 951.
[189] 419 U.S. 544, 556-558 (1975).
[190] *Id.* at 554, 556-558 (liquor sales).
[191] Salish & Kootenai, 941 F.Supp. at 951 (quoting 33 U.S.C. § 1377(h)(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding* the issuance of any [non-Indian] patent, and, including rights-of-way running through the reservation") (emphasis added). That definition follows nearly verbatim 18 U.S.C. § 1151(a), which provides "the term "Indian country" as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any [non-Indian] patent, and, including rights-of-way running through the reservation").
[192] 941 F.Supp. at 951 (quoting 33 U.S.C. § 1377(e)(2)).
[193] *Id.* at 951-952 (citing Justice White's decision for the Court in Brendale, 492 U.S. at 428).

while state WQS applied to adjacent segments next to non-Indian lands on the reservation.[194]

The second "significant development" EPA cited as supporting delegation, at least as presented, was less compelling. In 1990, Congress added a TAS provision to the Clean Air Act (CAA)[195] similar but not identical to the CWA provision enacted just three years earlier. Noting the 1990 CAA provision predated the 1991 WQS rule,[196] EPA implicitly dismissed the possibility Congress wrote different language in response to EPA declining to find delegation in the CWA provision. Instead, the agency said the CAA TAS provision offered additional insight into congressional intent on the CWA TAS provision, while acknowledging each statute must be viewed in light of its own language and legislative history.[197]

Both TAS provisions contained the same basic eligibility criteria: the tribe must be federally recognized, have a governing body carrying out substantial governmental duties and powers, and be reasonably expected to be capable of carrying out the regulatory functions in a manner consistent with the Act and applicable regulations.[198] The statutes' authority criterions were slightly different. The earlier CWA provision required the regulatory "functions to be exercised by the Indian tribe [must] pertain to the management and protection of water resources … otherwise within the borders of an Indian

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[194] *Id.* at 952. *Accord* 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,878 ("EPA believes that a 'checkerboard' system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments").
[195] Pub. L. 101—549, title I, §§ 107(d), 108(i), Nov. 15, 1990, 104 Stat. 2464, 2467 (codified at 42 U.S.C. § 7601(d)).
[196] 2015 Proposed TAS Reinterpretation, supra note __, 80 Fed. Reg. at 47,434.
[197] *Id.* at 47,435.
[198] *Compare* 33 U.S.C. § 1377(e) *with* 42 U.S.C. § 7601(d)(2).

reservation."[199] The CAA provision required the regulatory "functions to be exercised by the Indian tribe [must] pertain to the management and protection of air resources within the exterior boundaries of the reservation *or other areas within the tribe's jurisdiction.*"[200] The CWA provision defined reservation as including non-Indian lands;[201] the CAA provision did not define reservation.[202] Despite these subtle differences, EPA determined "[b]y their plain terms, both statutes thus treat reservation lands and resources the same way and set such areas aside for tribal programs."[203]

EPA's implementing regulations for both TAS provisions also noted fundamental, critical commonalities (although not explicitly addressed by Congress): air and water pollutants are highly mobile, causing areawide effects presenting potentially serious health and welfare risks, and thus fragmented regulation cannot be effective.[204] Although EPA promulgated the CWA TAS implementing regulation in two and half years, it took the agency nearly eight years to do so for the CAA.[205] The CAA is without doubt much more complex than the CWA, and the CWA TAS provision had specified the CWA programs

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[199] 33 U.S.C. § 1377(e)(2).
[200] 42 U.S.C. § 7601(d)(2)(B) (emphasis added).
[201] *Id.* at § 1377(h)(1).
[202] It seems inevitable that complex legislation contains internal inconsistencies created inadvertently rather than by design. The CAA's legislative history contains no explanation for why section 301(d) that authorizes tribal treatment as a state for nearly every air program lacks a definition of reservation, *see* 42 U.S.C. § 7601(d)(2), whereas section 110(o) that focuses only on Tribal Implementation Plans does, *see* 42 U.S.C. § 7410(o). And section 164(c), the country's first tribal state-like role, adopted administratively by EPA in 1974 and codified by Congress in 1977, provides that the default air quality classification set for the Prevention of Significant Deterioration program may be redesignated by the tribe "within the exterior boundaries of reservations" without defining the latter term. S*ee* 42 U.S.C. § 7474(c).
[203] 2015 Proposed TAS Reinterpretation, supra note __, 80 Fed. Reg. at 47,435.
[204] 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,878; Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956, 43,959 (proposed Aug. 25, 1994).
[205] It took EPA nearly four years to propose the regulation, *see* Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956 (proposed Aug. 25, 1994), and then nearly four years to finalize it, *see* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1998).

allowed for tribal treatment as a state,[206] whereas Congress left EPA the responsibility for identifying the CAA programs appropriate for TAS.[207] The long delay, however, was more likely due to the less technical but more challenging effort of building the political will for the regulation's central and most controversial conclusion: Congress had delegated to tribes jurisdiction over non-Indian air polluters on reservations, thereby making showings of tribal inherent jurisdiction unnecessary.[208]

The inevitable legal challenge—brought by a menagerie of thirteen non-Indian business and utility groups whose operations and profit margins could be greatly affected by effective air pollution management in Indian country[209]—was soundly rejected by the D.C. Circuit Court of Appeals.[210] The court found EPA's interpretation of delegation comported with the statute's text, structure, purpose and legislative history. The TAS provision's disjunctive text regarding reservation air resources *and other areas* within a tribe's jurisdiction was a "clear distinction" implying Congress considered all reservation areas "to be *per se* within the tribe's jurisdiction."[211] The TAS provision was one of three

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[206] *See* 33 U.S.C. § 1377(e) ("The Administrator is authorized to treat an Indian tribe as a State for purposes of Title II and sections 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, and 404 of this Act").
[207] *See* 42 U.S.C. § 7601(d)(2) (directing EPA's Administrator to promulgate regulations "specifying those provision of this Act for which it is appropriate to treat Indian tribes as States").
[208] 63 Fed. Reg. at 7254.
[209] The main petitioners were the Arizona Public Service Company, the Salt River Project Agricultural Improvement and Power District, the Nevada Power Company the Public Service Company of New Mexico, the Tucson Electric Power Company, the Oklahoma Gas & Electric Company, the National Mining Association, the National Association of Manufacturers, the American Forest & Paper Association, the Timber Producers Association of Michigan and Wisconsin, the Michigan Chemical Council, and the Rhinelander (Wisconsin) Area Chamber of Commerce. Claims that EPA's view impinged on states' sovereignty peppered the suit, but curiously, no state or state environmental agency lodged a petition. The State of Michigan did intervene, and when it later sought Supreme Court review three other states—South Dakota, Nevada and New Mexico—submitted an amicus brief. Four Indian tribes with emerging air programs—Gila River Indian Community, Navajo Nation, Salt River Pima-Maricopa Indian Community, and Shoshone-Bannock Tribes—intervened on EPA's side.
[210] Arizona Public Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied sub nom*, Michigan v. EPA, 532 U.S. 970 (2001).
[211] 211 F.3d at 1288.

parts of the statute seeking an increase in tribal roles in the cooperative federalist framework for regulating air quality within the nation.[212] The court agreed with EPA's expert view that a fragmented parcel-by-parcel checkerboard approach would not serve the Act's purpose of effective air quality management because air pollutants are highly mobile, disperse widely, and present significant health and welfare risks.[213] And finally, the court noted Congress had rejected language limiting tribes to management functions "within the area of the tribal government's jurisdiction,"[214] which "strongly suggested" Congress viewed all areas within reservations as subject to tribal jurisdiction and also showed Congress knew how to draft language requiring tribes show jurisdiction to qualify for treatment-as-a-state.[215]

One judge dissented.[216] As EPA had opined in the water context, it just seemed reasonable to the dissent that Congress would be clear when it delegated tribal authority over non-Indians. The dissent read such intent in section 110(o)'s authorization for Tribal Implementation Plans over "*all areas* ... located within the exterior boundaries of the reservation, *notwithstanding* the issuance of any patent, and including rights-of-way running through the reservation."[217] That same "notwithstanding" proviso is a key part of the standard definition of Indian country, which formed the foundation of the Supreme Court's conclusion in *Mazurie* that Congress had delegated to tribes regulatory authority over liquor sold non-Indians on fee lands on reservations.[218] At the time of *Arizona Public*

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[212] *Id.* at 1284.
[213] *Id.* at 1288 (citing Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956, 43,959 (Aug. 25, 1994)).
[214] S. 1630, 101st Cong. §113(a) (1990); H.R. 2323, 101st Cong. §604 (1989).
[215] 211 F.3d at 1289.
[216] *Id.* at 1300 (Ginsburg, J., dissenting).
[217] 42 U.S.C. § 7410(o) (emphasis added).
[218] 211 F.3d at 1303 (Ginsburg, J., dissenting) (citing Mazurie, 491 U.S. 544 (1975)).

Service, *Mazurie* was the only case directly confronting the issue of congressional delegation to tribes. Another Supreme Court decision, *Rice v. Rehner*,[219] addressed *state* regulation in Indian country under the same liquor program, but repeated *Mazurie's* conclusion of a tribal delegation in rejecting an argument the federal law had preempted state regulation.[220] And, of course, four justices in *Brendale* had referred to the Clean Water Act's definition of reservation, which included the *notwithstanding* proviso, as a delegation. The dissent thus characterized the *notwithstanding* proviso as the "gold standard" for tribal delegations, and found its omission from the CAA TAS provision as fatal to EPA's conclusion.[221]

The majority rejected the dissent's asserted gold standard.[222] *Mazurie* did turn on the *notwithstanding* proviso since that was the statutory language before the Court, but so it had no occasion to consider other possible formulations.[223] That Congress used different language in the 1990 Clean Air Act amendments was thus not dispositive.[224] Indeed, the

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[219] 463 U.S. 713 (1983).

[220] *Id.* at 726-734. Like EPA, *see* 2016 TAS Reinterpretation, *supra* note __, 81 Fed. Reg. at 30,190, Judge Ginsburg cited Rehner for the proposition that Congress delegated liquor regulation to tribes over non-Indian fee lands within a reservation, *see* 211 F.3d at 1301-1302. It is true that Rehner said as much, *see* 463 U.S. at 716, 729, 734, but it did so not by analyzing the question (that was not before the court) but in using Mazurie's holding on that issue to find the federal Indian country liquor statute had not preempted the *state* from concurrently regulating on-reservation liquor sales. *See id.* at 726-734.

[221] 211 F.3d at 1301 (Ginsburg, J., dissenting).

[222] *Id.* at 1289.

[223] *Id.* at 1290. A fair conclusion to be sure. But, both the majority and the dissent, *and* EPA, missed Montana's explicit reference to the *notwithstanding* proviso: "If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in [the federal trespass statute] the definition of 'Indian country's' [*notwithstanding* proviso]." *See* 450 U.S. at 562-563.

[224] 211 F.3d at 1289. Indeed, the court noted the CWA WQS provision contained the dissent's "gold standard" and yet EPA declined to find a delegation from it. *Id.* An option different than delegation arose shortly thereafter. In United States v. Lara, 541 U.S. 193, 200 (2004), the Court held Congress had constitutionally "adjusted" the status of tribal inherent sovereignty by "recogniz[ing] and affirm[ing]" it included criminal prosecution of nonmember Indians. Although the CWA had no similar language, tribal attorney and professor Ann Tweedy used Lara's analysis to argue the TAS provision should be read as a congressional delegation. See Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL. L. 471, 486 (2005).

court suggested (wrongly) the difference might have been motivated by EPA's hesitation in 1989 to read the Clean Water Act's notwithstanding proviso as a delegation.[225] EPA had exercised caution there because of the Act's ambiguous and inconclusive legislative history, which the court found was not true for the subsequent Clean Air Act amendments.[226] The court thus upheld the Tribal Authority Rule's provision for approving tribes' reservation air programs based on congressional delegation without showing inherent jurisdiction over non-Indians.[227]

EPA was understandably pleased with adding another win in a long nearly unbroken streak of judicial successes for its Indian Program,[228] but its page-long

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[225] *Id.* ("We can assume that Congress was aware of EPA's contemporaneous interpretation of the Clean Water Act, first proposed in 1989 (while Congress contemplated the 1990 Amendments).... Thus, Congress' failure to use the same language in [the CAA TAS provision] does not at all imply that it meant to avoid delegation to the tribes; rather, it may suggest just the opposite."). This ostensibly logical assumption is weakened by the actual timing of the CAA TAS provision. It first appeared, in the same form as the enacted provision, on May 11, 1989, more than four months *before* the 1989 Proposed WQS Rule was issued on September 22, 1989. *See* Clean Air Restoration Act of 1989, H.R. 2323, 101st Cong. § 604 (1989).

[226] 211 F.3d at 1291.

[227] *Id.* at 1284. Also important, the D.C. Circuit endorsed EPA's treatment of tribal trust lands and pueblos as informal reservations entitled to the benefit of the CAA delegation, *see id.* at 1292-1294, and by extension, lent support for EPA's long held similar view for TAS primacy under the CWA, *see* 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,881.

[228] *See, e.g.,* Nance v. EPA, 645 F.2d 701 (9th Cir.) (upholding EPA's approval of the Northern Cheyenne's PSD redesignation), *cert. denied sub nom.*, Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981); State of Wash., Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (upholding EPA's refusal to delegate RCRA hazardous waste in Indian country programs to state); Phillips Petroleum Country. v. EPA, 803 F.2d 545 (10th Circuit 1986) (upholding EPA's direct implementation of the SDWA underground injection in Indian country); Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (upholding EPA's approval of the Isleta Pueblo's WQS), *cert. denied*, 522 U.S. 965 (1997); Salish and Kootenai, *supra* note __, (upholding EPA's approval of the WQS of the Confederated Salish and Kootenai Tribes of the Flathead Reservation), *aff'd*, 137 F.3d 1135 (9th Cir. 1996), *cert. denied*, 525 U.S. 921 (1998); Montana v. EPA, *supra* note __, (affirming the district court in upholding EPA's approval of the Confederated Salish and Kootenai Tribes' WQS); Montana v. EPA, 141 F.Supp.2d 1259 (D. Mont. 1998) (upholding EPA's approval of the Assiniboine and Sioux Tribes' WQS); Arizona v. EPA, 151 F.3d 1205 (9th Circuit 1998) (upholding EPA's approval of the Yavapai Apache's PSD redesignation), *modified*, 170 F.3d 870 (9th Circuit 1999); Hydro Resources, Inc. v. EPA, 198 F.3d 1224 (10th Circuit 2000) (upholding EPA's direct implementation of the SDWA of areas whose Indian country status was in dispute); Arizona Public Service Company v. EPA, 211 F.3d 1280, 1288 (D.C. Cir. 2000) (upholding EPA's interpretation of the CAA TAS provision as a congressional delegation to tribes of jurisdiction over non-Indians on-reservation), *cert. denied sub nom*, Michigan v. EPA, 532 U.S. 970 (2001); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002) (upholding EPA's approval of the Sokaogon Chippewa Community's WQS).

EPA's Indian program has suffered some losses. *See, e.g.,* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (rejecting EPA direct implementation of the RCRA solid waste program on a finding the

description (in usual triple-column Federal Register format) of *Arizona Public Service's* affirmation of EPA's delegation interpretation of the 1990 CAA as support for reinterpreting the 1987 CWA TAS provision as a delegation was a stretch. EPA sought additional support in tribes' and EPA's experience in developing and processing CWA TAS applications.[229] It noted TAS Tribes have "repeatedly" expressed concern that demonstrating inherent jurisdiction "is challenging, time consuming and costly," and "many tribes" have said it constituted "the single greatest administrative burden" of the TAS application process.[230] Unfortunately, the clearly intended broad impact of those facially significant generalizations in the Federal Register was substantially undermined by the proposal's underlying and uncited documentation showing they were based on input from just eight tribes.[231] That tiny sample size also weakened the agency's claim that this "general experience confirm[ed]" the jurisdiction requirement imposed unintended

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reservation had been diminished); Wyoming v. EPA, 875 F.3d 505, 511 (10th Cir. 2017) (rejecting EPA direct implementation of the SDWA solid waste program on a finding the reservation had been diminished), *cert. denied*, 17-1159 (June 25, 2018); Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996) (vacating EPA's approval of the Campo Band of Mission Indians' solid waste program under RCRA); Arizona v. EPA, 151 F.3d at 1212-1213 (invalidating EPA's attempt to make the Yavapai Apache's PSD redesignation effective through a federal Implementation Plan); Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001) (invalidating EPA's rule for direct implementation of the federal operating permit program on lands whose Indian country status was in question).

[229] 2015 Proposed TAS Reinterpretation, supra note __, 80 Fed. Reg. at 47,436.

[230] *Id.*

[231] *See* INFORMATION COLLECTION REQUEST FOR REVISED INTERPRETATION OF CLEAN WATER ACT TRIBAL PROVISION (Final Interpretive Rule) 3 (March 2016), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0117. This analysis focused on the anticipated administrative burden and cost of proposed federal actions on other governments and private actors. EPA's conclusions there were based in methodological analysis of data from those eight tribes. Commonsense and long experience with administrative agencies suggests EPA's conclusions were also influenced by unquantified, and perhaps extensive, interactions with tribes since 1991 when the original WQS rule became effective. That assumption is, perhaps, partially corroborated by the National Tribal Water Council's 2013 assertion that the inherent jurisdictional showing "has prevented many tribes from establishing federally approved WQS." *EQUAL TREATMENT FOR TRIBES*, supra note __, at 1.

administrative hurdles on tribes and required substantial commitments of limited tribal resources.[232]

The dataset for *EPA's* work in reviewing tribal applications was somewhat larger. The agency reviewed 29 tribes approved after enhanced TAS review procedures were adopted in 1998.[233] Of those, 14 had reservations with non-Indian fee lands, 12 had none and three lacked information.[234] EPA's analysis of the 26 applications indicated the agency took an average of 1.6 years longer to approve tribes with non-Indian fee lands on their reservations than those without such lands.[235] All of these administrative hurdles no doubt contributed to the National Tribal Water Council's 2013 assertion that the inherent jurisdictional showing "has prevented many tribes from establishing federally approved WQS."[236]

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[232] 80 Fed. Reg. at 47,436. EPA correctly noted that eliminating unintended administrative burdens is not a legal justification for its reinterpretation, but said it offered a strong policy basis for reconsideration especially in light of the reinterpretation's consistency with agency and executive branch policy favoring tribal self-determination. 80 Fed. Reg. at 47,436.

[233] *See* ADOPTION OF THE RECOMMENDATIONS FROM THE EPA WORKGROUP ON TRIBAL ELIGIBILITY DETERMINATIONS, memorandum from Robert Perciasepe, Assistant Administrator for the National Indian Program, and Jonathan Z. Cannon, General Counsel, EPA, (March 19, 1998). This document is no longer available on EPA's website, but it is summarized in the 2015 Proposed TAS Reinterpretation, supra note __, 80 Fed. Reg. at 47,439 n.15).

[234] ANALYSIS OF TAS PROCESSING TIMES 1 (June 17, 2015), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0013.

[235] 80 Fed. Reg. at 47,436. The finding did include time tribes spent refining the application and providing additional materials EPA requested *after* application submission, but did not attempt any assessment of the time it took tribes to complete the TAS application *before* submission.

[236] *EQUAL TREATMENT FOR TRIBES*, supra note __, at 1. The most logical reading of the Council's assertion (it offered no data or anecdotal information) is that most tribes have consciously decided not to develop WQS programs. It could also have meant tribes whose submitted programs languished in EPA's bureaucracy for years. *See, e.g.,* comment by Chaitna Sinha, Attorney, Office of the Reservation Attorney, Confederated Tribes of the Colville Reservation 3 (Oct. 6, 2015) (reporting the Tribes' preparation of its CWA TAS application took "a period of years" before submission in 2013 and still had not been approved by October 2015, *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0099. EPA did approve the Tribes' WQS three years later in 2018 (about 4.4 years after submission). *See* https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts. This is historically interesting in that Colville was the first and only tribe for which EPA issued federal WQS for an Indian reservation, 29 years earlier. *See* Water Quality Standards for the Colville Indian Reservation in the State of Washington, 54 Fed. Reg. 28,622 (July 6, 1989). The reason was that the Tribes had developed their own WQS program in 1984 before Congress added the TAS provision in 1987, and pressed EPA to issue them as federal WQS so they would be legally

Without questioning the bona fides of the tribes or EPA, their assertions are extremely difficult to square with the 1991 WQS Rule's operating rule's "relatively simple showing" to demonstrate tribal inherent jurisdiction.[237] At its essence, the rule asked only that tribes (1) show their reservation had surface waters used by tribal members, and (2) *assert* that non-Indian water pollution would have a serious and substantial effect on tribal health and welfare.[238] Except for delegation, showing jurisdiction can't get any easier. States certainly felt that way. An Amicus brief by eleven states supporting Montana's unsuccessful plea for Supreme Court review of EPA's approval of the Salish & Kootenai Tribes' WQS was especially blunt in complaining about the operating rule: "In place of careful, fact-intensive historical inquiry into the status of a reservation, EPA has concocted *a simplistic, wooden formula under which no tribe could ever fail to receive state status* under the Clean Water Act."[239] Perhaps, but tribes had to apply first. In 2015, EPA candidly acknowledged its prior expectation that the operating rule's simple burden would spur more tribal applications had not been realized.[240]

Hoping for a better result, EPA finalized its interpretation of the CWA TAS provision as a congressional delegation to tribes of jurisdiction over reservations including non-Indian fee lands.[241] The 2016 Federal Register announcement iterated the same arguments

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enforceable across CWA programs. *Id.* Just two months after EPA issued the Colville WQS as federal standards, EPA released its proposed CWA TAS regulations suggesting processes for approving tribal WQS, 54 Fed. Reg. 39,098. EPA made clear the Colville approach was not "a model" or "a precedent" for the future since EPA now had congressional authorization for approving tribal WQS. 54 Fed. Reg. at 28,622.

[237] 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,879.

[238] *Id.*

[239] Brief of Amici Curiae States of Arizona, California, Colorado, Florida, Idaho, Michigan, Nebraska, Nevada, South Dakota, Utah, and Wisconsin, in Support of Petition for Writ of Certiorari, State of Montana v. United States Environmental Protection Agency 10-11 (1998) (No. 97-1929) (emphasis added).

[240] 80 Fed. Reg. at 47,436.

[241] *See* 2016 TAS Reinterpretation, supra note __, 81 Fed. Reg. at 30,183.

laid out in the 2015 proposed rule, and responded to comments in response to the 2015 proposal. The main theme of the comments was, of course, whether the agency's delegation interpretation was reasonable.

Tribal jurisdiction generally, and tribal environmental regulatory jurisdiction specifically, directly implicates the governmental authority of over 300 tribes with reservation lands eligible for CWA TAS status[242] and 34 states with Indian reservations.[243] It has the potential to influence control of thousands of industry firms and businesses, both tribally and non-Indian owned, and thousands if not tens of thousands of individual Indian and non-Indian people. And the extent of tribal jurisdiction is a matter of interest for dozens of non-governmental organizations supporting tribes, or states, or industry. It is fairly surprising then, that the proposed rule generated *only 44* comments.[244]

The majority of commenters—including eighteen tribes, three tribal organizations, some members of the public *and* two states[245]—strongly supported the agency's

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[242] EPA says there are "over 300 tribes" with reservation lands eligible for CWA TAS. *See* Federal Baseline Water Quality Standards for Indian Reservations, 80 Fed. Reg. 66,900, 66,902 (advance notice of proposed rulemaking Sept. 29, 2016) (including formal reservations, Pueblos and informal reservations, which are lands held in trust by the United States for tribes that are not officially designated as reservations).

[243] *See* BIA's map of Indian Lands in the United States, https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc013422.pdf.

[244] 81 Fed. Reg. at 30,184. In 2014, EPA conducted tribal "consultation" under Executive Order 13175 via distance webinars. Interestingly, EPA met *in person* with ten national and regional state associations and held "additional informational meetings" with state associations and some individual states. *Id.* The final rule reported 21 tribal comments. *Id.*

[245] Not all states have a kneejerk reaction to assertions of tribal sovereignty. Of the 38 states with Indian reservations, thirty did not comment on EPA's proposed reinterpretation. Perhaps they simply missed the announcement. Of the eight states that did comment, two were supportive of the delegation reinterpretation. *See* comment of Larry Wolk, Executive Director, Colorado Department of Public Health and Environment 1 (Oct. 1, 2015) (indicating the State is "generally in favor of tribes obtaining treatment as a state under the Clean Water Act and therefore supportive of the reinterpretation" and also noting a specific federal law addressing state and tribal jurisdiction on the Southern Ute Reservation), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0076, and comment of John Linc Stine, Commissioner, Minnesota Pollution Control Agency 1 (Oct. 2, 2015) (noting Minnesota "[h]istorically the Minnesota Pollution Control Agency has supported Minnesota tribes when they apply to EPA for treatment as a state (TAS) approval" and that when disagreements have arisen the state agency has worked with EPA and

interpretation.[246] The minority—six states,[247] several local governments, industry and one member of the public—mostly restated arguments EPA either explained or rejected in the 2015 proposal, but a few were new. One noted Congress amended the TAS provision in 2000 making tribes eligible for a new CWA program,[248] and suggested had Congress really been concerned with EPA's interpretation requiring inherent jurisdiction it would have corrected it then.[249] EPA soundly rejected that suggestion, noting: Congress' narrow purpose to insert the new, non-regulatory monitoring and funding program in the TAS provision; the anomalousness of Congress addressing regulatory authority as an adjunct to inserting a non-regulatory program; the pre-existence of the delegation "gold standard" in the TAS provision; and the fact EPA had never denied a tribe's application based on an absence of authority.[250]

2. Interpretative Rule Versus Legislative Rule

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the tribe to find a cooperative resolution), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0083.

[246] *Id.* at 30,184.

[247] Two of the six states did not attack EPA's legal basis for its reinterpretation. Their comments focused on ensuring the new approach did not trench on special federal laws specifically addressing state and tribal environmental jurisdiction in those states. *See* comment of Janet T. Mills, Maine Attorney General, Augusta, Maine 1-6 (Sept. 8, 2015) (asserting the Maine Indian Land Claims Settlement Act, 25 U.S.C. §§ 1721 et seq. (1980), provided the State with environmental authority over all lands in the State including Indian reservations), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0068, and comment of Scott Thompson, Executive Director, Oklahoma Department of Environmental Quality 1-2 (Sept. 6, 2015) (noting the miscellaneous provision of a federal transportation law providing for joint tribal-state water quality regulation in Oklahoma), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0081.

[248] *See* Beaches Environmental Assessment and Coastal Health Act of 2000, Pub. L. 106-284, 114 Stat. 970 § 6 (2000) (adding section 406, 33 U.S.C. § 1346, Coastal Recreation Water Quality Monitoring And Notification, to list of CWA programs authorized for tribal TAS).

[249] 81 Fed. Reg. at 30,188.

Similar arguments about TAS amendments implying a prior lack of tribal or federal jurisdiction have also been rejected. *See, e.g.,* Nance v. EPA, 645 F.2d 701, 714 (9th Cir.) (finding CAA TAS provision while not ratifying EPA's prior treatment of tribal program in a manner like states, certainly indicated Congress' view it was appropriate), *cert. denied sub nom.*, Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981); Phillips Petroleum Company v. United States Environmental Protection Agency, 803 F.2d 545, 557 (10th Cir. 1986) (rejecting argument that SDWA TAS amendment showed the Act didn't apply to Indian country previously).

[250] 81 Fed. Reg. at 30,188-30,189.

One commenter raised an administrative law oddity not explained in the 2015 proposal: EPA's selected mechanism for reinterpreting the CWA TAS provision was an interpretative rule.[251] The bureaucratically uninitiated might view that choice as perfectly logical, except the agency announced its contrary 1991 interpretation in a substantive rule. Substantive rules are sometimes called "legislative" rules because unlike interpretative rules, they have the force and effect of law.[252] EPA, as much as tribes, are legally bound to follow the 1991 rule.[253]

However, administrative law is clear that "[a]n initial agency interpretation is not instantly carved in stone."[254] So EPA could reverse course; however, "[i]t is a maxim of administrative law that: 'that if a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course an amendment to a legislative rule must itself be legislative."[255] A state representative asserted EPA's proposed reinterpretation was amending or repealing the 1991 rule, and was thus required to be a substantive rule.[256]

The comment arguably missed a subtle distinction although it ultimately had no significant legal or practical consequence. EPA was proposing a reinterpretation of

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[251] 2015 Proposed TAS Reinterpretation, supra note __, 80 Fed. Reg. at 47,430 ("ACTION: Proposed interpretive rule").
[252] *See, e.g.,* Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995); *National Mining Assn. v. McCarthy,* 758 F.3d 243, 251–252 (2014) (explaining a legislative rule imposes "legally binding obligations or prohibitions on regulated parties" whereas an interpretative rule "merely interprets a prior statute or regulation ...[and does not impose] new requirements on regulated parties")
[253] *See* United States v. Nixon, 418 U.S. 683, 695-696 (noting an agency issuing a legislative rule is itself bound by the rule until amended or revoked).
[254] *See* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 863 (1984).
[255] National Family Planning & Reproductive Health Assn., Inc. v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (quoting Michael Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 Duke L.J. 381, 396).
[256] *See* Comment of Timothy Andryk, Chief Counsel, Wisconsin Department of Natural Resources 6-7 (Oct. 6, 2015), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0077.

Congress' statutory TAS provision, not the agency's 1991 administrative rule. True, the 1991 rule was legislative in that it set out the legally binding procedures for tribes seeking TAS status, including the requirement tribes state their authority for regulating water quality.[257] But, importantly, that requirement did not mandate the substantive basis of the tribe's asserted authority. Thus, EPA's operating "rule," which described the "simple showing" EPA believed would demonstrate the tribe's inherent authority over water quality, was not a legislative rule. Properly understood, it was not a legal requirement at all; it was EPA's (cautious) interpretation of the statute as not a delegation and its attempt to integrate the *Montana* test into the CWA TAS context. It thus set out EPA's expert interpretation of the CWA's goals and concerns relevant to human health and the environment, and how those related to the core tribal sovereignty interests of tribes in protecting against the serious and substantive risks water pollution presents to tribal members.[258] Replacing it, then, did not require a substantive rule.

EPA implied this analysis in its observation that its reinterpretation did not require any revisions to the existing TAS regulatory requirements:[259] the regulation still required that tribes state their authority to regulate water quality.[260] Since the existing regulation's structure accommodated the reinterpretation, EPA said revising the TAS application procedures was "unnecessary and counterproductive."[261] Perhaps more pertinent, the main reason parties argue over whether a rule is legislative or interpretative is that the

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[257] *See* 40 C.F.R. § 131.8(b)(3)(ii) (requiring "[a] statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribe's assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority").
[258] 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,878-64,879.
[259] 2016 TAS Reinterpretation, supra note __, 81 Fed. Reg. at 30,183.
[260] 40 C.F.R. § 131.8(b)(3)(ii).
[261] 81 Fed. Reg. at 30,190.

federal Administrative Procedure Act requires the former to go through a notice and comment process whereas the latter is exempt.[262] Agencies sometimes use interpretative rules or other non-binding instruments like guidance documents, directives, memos and the like apparently to revise substantive rules by without public comment.[263]

Here, despite selecting the interpretative rule vehicle, EPA conducted the typical notice and comment process required for legislative rules. The agency said its motivation for doing so was increased transparency and public input.[264] That begged the question why then not simply issue a legislative rule? The answer was implied many Federal Register triple-columns earlier in the introductory General Information section: interpretative rules are not considered final agency action subject to immediate judicial review.[265] An immediate legal challenge would hinder EPA's goal of increasing tribal WQS TAS applications, as demonstrated clearly when EPA promulgated its legislative CAA TAS rule finding congressional delegation to tribes over all air resources on reservations. There, the agency was immediately sued, and judicial resolution took nearly three and a half years,[266] significantly delaying implementation and potential development of tribal air programs. In contrast, announcing its delegation interpretation in an interpretative rule meant that tribes (and others) knew the agency would now approve tribal TAS applications without

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[262] 5 U.S.C. § 553(b)(3)(A).
[263] *See, e.g.,* Morton v. Ruiz, 415 U.S. 199, 236 (1974) (invalidating agency attempt to use unpublished, internal guidance manual in a manner inconsistent with published substantive regulations); National Family Planning, 979 F.2d 227 (invalidating an agency "Directive" adopted without notice and comment that directly contradicted a prior legislative rule).
[264] 81 Fed. Reg. at 30,191.
[265] *Id.* at 30,185 (noting judicial review of the final interpretative rule could come only in the context of EPA's approval of a particular tribe's CWA TAS application).
[266] The CAA TAS rule was issued February 12, 1998. 63 Fed. Reg. 7254 (Feb. 12, 1998). The circuit court's favorable decision was issued May 5, 2000, and *en banc* review was denied July 12, 2000. Arizona Public Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000). The Supreme Court denied certiorari April 16, 2001. Michigan v. United States Environmental Protection Agency, 532 U.S. 970 (2001).

any *Montana* test analyses until a particular TAS approval was challenged, successfully, in court. And if challenged, the fact EPA used the same public process as that of substantive rulemaking would ensure that if the Court somehow decided the *notwithstanding* proviso no longer reflects clear congressional delegation intent, the agency should receive Chevron deference upholding its reasonable interpretation even if other interpretations were possible.[267]

C. Diminishment of Indian Reservations

A third category of comments on EPA's 2015 reinterpretation proposal raised the modern impacts of an historical reality and its accompanying legal rule. That rule has become increasingly dangerous for tribal sovereignty and tribal territory and threatens not only tribal TAS but EPA's Indian Program itself. The historical reality was the misguided Assimilation and Allotment Era, when Congress passed dozens of laws authorizing "allotments" of formerly communal tribal land to individual Indians, and treating the remaining reservation lands as "surplus" open to non-Indian ownership.[268] The congressionally-introduced presence of non-Indians in Indian reservations was ostensibly for the benefit of Indigenous peoples. A Senate Report for one such act suggested in the accepted ethnocentric tone of the time:

> "The occupation of the land released by [the Indians] by actual settlers under the homestead law bringing [the Indians] in close contact with the frugal, moral, and industrious people who will settle there will stimulate individual effort and make [the Indians' assimilative] progress much more rapid than heretofore."[269]

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[267] U.S. v. Mead Corp., 533 U.S. 218, 231 (2001) (noting the significance of notice-and-comment procedures in triggering Chevron deference).
[268] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2019) § 1.04.
[269] Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F. Supp. 878, 884 (D. SD 1995) (quoting S. Rpt. No. 196, 53d Cong., 2d Sess., 1 (1894)).

Perhaps some Euro-Americans truly believed that notion and the legitimacy of its purported goal. History suggests a more likely congressional motivation: making more land available for the continuing tide of European immigrants.[270] Indian tribes lost 90 million acres or more in the allotment process,[271] but apart from that tragic reality was significant confusion on the status of the reservation lands that passed from federal trust into fee ownership by non-Indians.

In the middle of the allotment era the Court held Congress' so-called "plenary" authority over Indian affairs included unilaterally taking Indian lands promised in solemn treaties.[272] Yet, two years later the Court said "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."[273] Such action could be clear, for example, from statutes that "restored" portions of Indian reservations to the public domain.[274] The more difficult question was whether the allotment acts, which made way for non-Indian ownership of lands within reservations not restored to the public domain, also diminished reservations.

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[270] *See, e.g.,* DeCoteau v. District County Court, 420 U.S. 425, 431 (1975) ("But familiar forces soon began to work upon the Lake Traverse Reservation. A nearby and growing population of white farmers, merchants, and railroad men began urging authorities in Washington to open the reservation to general settlement."). *See generally* Judith V. Royster, The Legacy Of Allotment, Ariz. State L. J. 1 (1995).

[271] *See* COHEN'S HANDBOOK, *supra* note __, at § 1.04.

[272] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[273] United States v. Celestine, 215 U.S. 278, 285 (1909). *Accord* Solem v. Bartlett, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries").

[274] *See, e.g.,* United States v. Pelican, 232 U.S. 442, 445-446 (1914) (a specified portion of the reservation was "vacated and restored to the public domain"); Sioux Tribe v. United States, 316 U.S. 317, 323 (1942) (President ordered lands previously reserved for Indian use "restored to the public domain[,] ... the same being no longer needed for the purpose for which they were withdrawn from sale and settlement"); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 354 (1962) (Act which "vacated and restored to the public domain" certain reservation lands diminished the reservation as to those lands).

Initially, the Court explicitly rejected arguments that the mere purchase of reservation lands by non-Indians meant the reservation had been diminished.[275] Instead, the Court repeatedly framed the question with a well settled canon of construction: statutory ambiguities are to be interpreted in favor of tribes.[276] Reservation diminishment, then, required a fairly clear expression of congressional intent in the particular allotment and surplus land act.[277] What otherwise appeared a straightforward statutory inquiry was significantly complicated by the political realities of the past:

> Another reason why Congress did not concern itself with the effect of surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, *Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.*[278]

Nonetheless, the Court says it has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every

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[275] *Id.* at 357 (noting the issue had "been squarely put to rest" by the statutory definition of Indian country including lands within reservations "notwithstanding the issuance of any patent" to non-Indians (quoting 18 U.S.C. § 1151(a)).

[276] *See, e.g.,* Choate v. Trapp, 224 U.S. 665, 675 (1912) ("doubtful expressions" (in an allotment act) are to be resolved in favor of the tribe); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977) ("In determining [congressional diminishment] intent, we are cautioned to follow 'the general rule that '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith'" (quoting McClanahan v. Arizona State Tax Comm'n, 441 U.S. 163, 174 (quoting Carpenter v. Shaw, 280 U.S. 383 (1930)))); Hagen v. Utah, 510 U.S. 399, 410 (1994) ("Throughout the [diminishment] inquiry, we resolve any ambiguities in favor of the Indian" (citing Solem, 465 U.S. at 470)).

[277] *See, e.g.,* Seymour, 368 U.S. at 355 (finding no congressional language "expressly vacating" a portion of the reservation); Mattz v. Arnett, 412 U.S. 481, 505 n. 22 (1973) ("Congress has used clear language of express termination when that result is desired"); Solem, 465 U.S. at 470 ("diminishment will not be lightly inferred"); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (Congress' intent to diminish treaty terms establishing an Indian reservation must be "clear and plain" (quoting United States v. Dion, 476 U.S. 734, 738-739 (1986))); Nebraska v. Parker, 136 S.Ct. 1072, 1079 (2016) (Congress' intent to diminish the reservation "must be clear" (quoting Solem, 465 U.S. at 470)).

[278] Solem, 465 U.S. at 468 (footnote omitted) (emphasis added).

surplus land act. Rather, "it is settled law that some surplus land acts diminished reservations and other surplus land acts did not."[279]

Distinguishing between them requires navigating a complex three-part analysis. "The most probative evidence of congressional intent is the statutory language,"[280] which the Court admitted is often ambiguous because of Congress' hope Indian country would simply wither away. If the statutory language was unclear, then the Court would see if the historical context surrounding passage of the act revealed "a widely held, contemporaneous understanding the affected reservation would shrink ... [in which case] we have been willing to infer Congress shared [that] understanding."[281] Finally, but "to a lesser extent,"[282] the subsequent settlement and governmental treatment of the area in question can help "decipher" congressional intent.[283] Although the Court has said it "has never relied *solely*" on the latter factor,[284] evidence of regular state exercises of jurisdiction in disputed areas raise concern for upsetting the "justifiable expectations" of non-Indians and disrupting the administration of state and local government programs, which often seem to become compelling justifications supporting congressional diminishment.[285]

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[279] *Id.* at 468-469 (citations omitted).
[280] *Id.* at 470.
[281] *Id.*
[282] The Court's implication here was made clear by its later admission (in a footnote) that using subsequent demographic history as a method of statutory interpretation "is, of course, [] unorthodox and potentially unreliable," but since Congress was generally unfocused on diminishment in the surplus land acts, "the technique is a necessary expedient." *Id.* at 471 n. 13. For one pointed criticism of this claim, *see* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers,* 109 Yale L.J. 1, 19 (1999) (noting "[t]he conceptual problem with this approach, of course, is that postenactment developments reveal nothing about original congressional intent, much less intent sufficiently clear to satisfy the canon" requiring ambiguous statutes to be construed in favor of tribal interests).
[283] Solem, 465 U.S. at 470.
[284] Parker, 136 S.Ct. at 1081 (emphasis added).
[285] *See, e.g.,* DeCoteau, 420 U.S. at 449 (noting state jurisdiction for 80 years that if ended "would be calamitous for all the residents of the area"); Rosebud Sioux Tribe, 430 U.S. at 604-605 (noting "the single most salient fact is the unquestioned actual assumption of state jurisdiction" for 70 years that "has created justifiable expectations which should not be upset"); Solem, 465 U.S. at 471 n. 13 (finding an area

Nothing in the historical development of EPA's Indian program[286] suggests that limiting state diminishment claims was the goal of its first Indian program action, but coincidentally its 1973 CWA regulations were clear the agency would not delegate water quality programs to states for implementation over Indian activities on Indian lands within the state.[287] The presumed bar on state delegation quickly expanded to the agency's other key regulatory programs in 1980 regulations indicating EPA would assume that a State lacks authority over Indian lands "unless the state affirmatively asserts authority and supports its assertion with an analysis from the state's attorney general."[288] The agency's early references to Indian lands were clarified in 1985 to mean Indian country (including non-Indian fee lands) in the first (unsuccessful) legal challenge to EPA's refusal to delegate a regulatory program to a state.[289] A year later a different court upheld EPA's direct implementation of another regulatory program in Indian country, accepting the parties' concessions the state had no implementation authority.[290] Indeed, EPA has said on multiple

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predominately populated by non-Indians remains Indian country "seriously burdens the administration of State and local governments"); Hagen, 510 U.S. at 421 (noting the state had exercised jurisdiction over the disputed area since enactment of the statute so that diminishment "would seriously disrupt the justifiable expectations of the people living in the area" (citing Rosebud, 430 U.S. at 604-605)); Yankton Sioux Tribe, 522 U.S. at 357 (finding support for a diminishment conclusion from the "State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day").

[286] *See* Grijalva, *Origins of EPA's Indian Program*, supra note __, (examining the historical development of EPA's Indian program from the agency's creation through the adoption of its 1984 Indian Policy and 1985 Implementation Guidance).

[287] National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (to be codified at 40 C.F.R. § 125.2(b)). EPA noted that for the few states with specific congressional authorization for Indian country implementation, it would address those programs on a case by case basis. *Id.*

[288] Permit Regulations for the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Clean Water Act and the Clean Air Act, 45 Fed. Reg. 33,290 (May 19, 1980) (to be codified at 40 C.F.R. pts. 122-125).

[289] Washington, Department of Ecology v. EPA, 752 F.2d 1465, 1467 n. 1, 1469-1471 (9th Cir. 1985) (delegate Resource Conservation and Recovery Act hazardous waste programs).

[290] Phillips Petroleum Company v. EPA, 803 F.2d 545 (10th Cir. 1986) (Safe Drinking Water Act underground injection in Indian country).

occasions that but for a very few states with unique congressional authorizations, it has never approved a state regulatory program for Indian country.[291]

On their face, these consistent actions have precluded states from developing a history of exercising jurisdiction, at least as to environmental management, in Indian country potentially reducing the risk of diminishment claims. Yet, in two contexts important to the subject of this article, EPA has departed from its foundation approach and taken the opposite view. In both its 1989 proposal and the 1991 final WQS TAS rule, the agency said "if States have established [water quality] standards that purport to apply to Indian reservations, EPA will *assume without deciding* that those standards remain applicable until a Tribe is authorized to establish its own standards."[292] This seemingly significant departure from EPA's Indian Policy was explained "not an assertion that State standards do necessarily apply as a matter of law" to reservation waters, but that "fully implementing a role for Tribes under the CWA will require a transition period" and ignoring developed state WQS would create "a regulatory void" unbeneficial to reservation water quality.[293] EPA thus asserted this practical solution to "an intractable problem" was fully consistent with its Indian Policy.[294]

Similar practical concerns were offered as justification for the agency's second clear departure from its foundation approach of keeping states out of Indian country. Two years later, EPA issued TAS regulations for a broader array of CWA programs, including the

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[291] 81 Fed. Reg. 31,896; Memorandum from Cynthia C. Dougherty, Director, Permits Division to Water Management Division Directors Regions I and II, and IV-X 3 (Nov. 16, 1993).
[292] 1989 Proposed WQS Rule, supra note __, 54 Fed. Reg. at 39,104 (emphasis added) (quoting a letter from EPA's General Counsel, Lawrence Jensen, to Dave Frohnmayer, Attorney General for the State of Oregon (September 9, 1988)). *See also* 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,890-64,891 (same).
[293] *Id.* at 64,891.
[294] *Id.*

section 402 program for issuing NPDES permits to point source water pollution dischargers.[295] EPA candidly acknowledged some states were issuing NPDES permits in Indian country without agency authorization.[296] Without EPA authorization it seemed clear those permits lacked legal effect, yet EPA again said it "assumed, without deciding," that existing permits on Indian reservations issued by States without specific authorization contained enforceable limits.[297] With no legal analysis, EPA simply repeated its reason from the WQS rule: until tribes (or EPA) assumed permit-issuing responsibility, there would be a regulatory gap in Indian country if existing state permits were not valid.[298]

Two decades or so have not seen further dramatic programmatic departures from the Indian Policy. More common are efforts aimed at decreasing state environmental incursions into Indian country. A pertinent example is EPA's treatment of state and local government comments in the 2016 CWA TAS reinterpretation implicitly or explicitly raising diminishment in the context of challenging EPA's reinterpretation.[299] One state noted the reinterpretation should exclude reservations "where the existence of the reservation or its boundaries are in dispute," [300] another suggested the reinterpretation should "categorically exclude waters inside disputed reservations,"[301] and a third state

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[295] Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act (CWA), 58 Fed. Reg. 67,966 (Dec. 22, 1993) (to be codified at 40 C.F.R. Parts 122, 123, 124 and 501).

[296] *Id.* at 67,974. *See also* Dougherty Memorandum, *supra* note __, at 3 (noting there are no known EPA approvals of state section 402 programs in Indian country but that some states are acting as "the de facto permitting authority" on reservations) (emphasis in original).

[297] 58 Fed. Reg. 67,974.

[298] *Id.* EPA spoke directly to existing state-issued permits (and existing state WQS). It did not say whether its policy allowed states to assert new WQS or issue new 402 permits, although the obvious logical answer was yes.

[299] *See* Rulemaking Docket, available at https://www.regulations.gov/docket?D=EPA-HQ-OW-2014-0461.

[300] Comment of Barry N. Burnell, Water Quality Division Administrator, Idaho Department of Environmental Quality 2 (December 22, 2016).

[301] Comment of Teresa Seidel, Chief Water Resources Division, State of Michigan Department of Environmental Quality 3 (Dec. 28, 2016).

described a reservation almost wholly owned in fee by non-Indians but yet found not disestablished.[302] Three counties in one state jointly submitted a comment describing decades of diminishment litigation over two reservations, noting its success in the Supreme Court in one case, apparently in support of their suggestion EPA adopt a bright line rule excluding fee lands settled by non-Indians within Indian reservations pursuant to surplus lands acts.[303] Three towns within those counties also commented, expressly incorporating by reference the counties' comments, and then essentially iterated them anyway.[304] A fourth town in a different state, but with even more animosity to the reservation that overlaps its borders, listed various historical events with no clear or logical connection to its assertion the reservation has been diminished or disestablished.[305]

All those comments were of course publicly available in the electronic rulemaking docket. They aren't, however, as publicly prominent as the Federal Register announcement of the agency's final rule. Nowhere in the Federal Register response did the agency name the Diminishment doctrine or even use the term diminishment. Instead, EPA blandly characterized comments from several local governments as "seeking clarification of the geographic scope of [CWA] TAS."[306] The local governments, EPA reported, noted some reservations were opened by statute to non-Indian settlement at the turn of the nineteenth century, and that in certain situations courts found those surplus land acts resulted in fee

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[302] Comment of Kathleen Clarke, Director, Office of the Governor, Public Lands Policy Coordinating Office, State of Utah 4 (Dec. 28, 2016).
[303] Ron Winterton, Chairman, Duchesne County, Michael J. McKee, Chair, Board of County Commissioners, Uintah County and Michael K. Davis, Manager, Wasatch County 1-11 (Oct. 6, 2015).
[304] Comment of RoJean Rowley, Mayor, City of Duchesne, Vaun D. Ryan, Mayor, City of Roosevelt and Kathleen Cooper, Mayor, City of Myton 1-10 (Oct. 6, 2015).
[305] Comment of Andrew J. Vickers, Hobart Village Administrator, Village of Hobart, Wisconsin 4-8 (Sept. 8, 2015).
[306] 2016 TAS Reinterpretation, supra note __, 81 Fed. Reg. at 30,191.

lands losing their reservation status.[307] The agency said the local governments urged EPA expressly exclude from its rule fee lands settled by non-Indians within Indian reservations pursuant to surplus lands acts.[308]

EPA's response did not note that bright line suggestion directly conflicted with the federal definition of Indian country expressly including non-Indian fee lands within Indian reservations.[309] The agency did flip the local governments' logic on them: several had cited their involvement in litigation over decades on these complex and intensely fact-specific issues, so EPA observed it would be "inappropriate [for EPA's rule] to establish a single one size-fits-all approach."[310] Ultimately though, EPA simply said the geographic scope of TAS under the CWA was outside the scope of the rule, as it did not change the agency's prior approach of limiting CWA TAS to reservation waters.[311] The agency could not, and so the rule would not, authorize tribal jurisdiction over non-reservation waters.[312]

EPA's avoidance of the diminishment term was surely intentional. The Diminishment doctrine is a historical anachronism carrying contemporary risks for tribal environmental self-determination and EPA's Indian Program itself. In 2008, the Eastern Shoshone and Northern Arapahoe Tribes of the Wind River Reservation in Wyoming applied to EPA for TAS for a variety of non-regulatory CAA programs.[313] During the

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[307] *Id.*
[308] *Id.*
[309] *See* 18 U.S.C. § 1151.
[310] 81 Fed. Reg. at 30,192.
[311] *Id.* at 30,191. As required by the 1991 WQS Rule, the applicant tribe would still submit a map or legal description of the area over which the Indian Tribe asserted authority to regulate surface water quality, *see* 40 C.F.R. § 131.8(b)(3)(i), and identify the surface waters for which the Tribe proposed to establish water quality standards, *see id.* at § 131.8(b)(3)(iii).
[312] *Id.*
[313] Approval of Application Submitted by Eastern Shoshone Tribe and Northern Arapaho Tribe for Treatment in a Similar Manner as a State Under the Clean Air Act, 78 Fed. Reg. 76,829 (Dec. 19, 2013). The programs concern matters like planning, monitoring air quality, participating in regional discussions about transboundary pollution, ability to redesignate air quality classifications and the like. *Id.* at 76,830. No permit-

preliminary, specialized period for other governments' comments on the Tribes' authority,[314] a veritable host of entities dominated by the State, local governments and other non-Indians argued a portion of the Reservation was diminished by a 1905 act.[315] EPA consulted with the Department of the Interior, which issued an opinion that concluded the Tribes' application correctly described the Reservation's boundaries as not diminished.[316] In 2013, EPA approved the Tribe's TAS status, and was promptly sued by the State.[317]

The court's analysis demonstrates the indeterminate nature of the diminishment factors, which inherently breeds confusion and uncertainty that causes some parties to hesitate and others to press their positions forcefully. The court confronted statutory language similar to but not the same as cases finding diminishment,[318] a long and convoluted history surrounding passage of the act suggesting diminishment,[319] and subsequent history of the area "so rife with contradictions and inconsistencies as to be of no help to either side."[320] Ultimately, the court concluded the statutory language was clear enough, especially as supported by Congress' long attempts negotiating for purchase of the

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issuing authority or other direct regulatory powers over air polluters were sought or addressed in the application or agency approval.

[314] *See* text accompany notes __ to __ *infra*.

[315] See EPA's Decision Document 5-8 (Dec. 6, 2013).

[316] *Id.*

[317] Wyoming v. EPA, 875 F.3d 505 (10th Cir. 2017), *cert. denied*, Northern Arapaho Tribe, et al. v. Wyoming, et al., 138 S.Ct. 2677 (July 28, 2018).

[318] Wyoming v. EPA, 875 F.3d at 513-518.

[319] *Id.* at 518-522.

[320] *Id.* at 523 (quoting Solem, 465 U.S. at 478).

lands, to find diminishment intent[321] and vacated EPA's TAS approval.[322] Examining the same evidence, the dissent came to the opposite conclusion.[323]

Wyoming v. EPA was a painful reminder for tribes that irrespective of the nation's current policy of tribal self-determination and Congress' specific intention of tribal environmental self-determination, America's Indigenous peoples continue to live under the dark shadow of a painful colonial history that federal courts are more than willing to invoke where non-Indian interests might be affected, however indirectly.[324] Diminishment, though, doesn't just apply to tribal sovereignty; reservation lands "diminished" are no longer Indian country and thus the federal government's Indian affairs authority no longer applies there. That lesson was brought home to EPA in the only Indian country environmental law case to make it to the Supreme Court to date.[325]

The Resource Conservation and Recovery Act (RCRA) employs the modern cooperative federalism model for its program regulating the treatment, storage and disposal of hazardous waste,[326] and that was the context for EPA's early decision not to delegate that regulatory primacy to states for Indian country, which the Ninth Circuit upheld.[327] RCRA's other main program governs municipal landfills for non-hazardous solid

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[321] *Id.* at 522.
[322] *Id.* at 525. As is typical, the court remanded for further proceedings consistent with the opinion. EPA then revised its TAS approval to exclude the 25% of fee lands within the area diminished, keeping tribal CAA authority over the remaining 75% of trust lands as an informal reservation. *See* Revision to Approval of Application Submitted by Eastern Shoshone Tribe and Northern Arapaho Tribe for Treatment in a Similar Manner as a State Under the Clean Air Act, 84 Fed. Reg. 7823 (March 5, 2019).
[323] Wyoming v. EPA, 875 F.3d at 525 (Lucero, J., dissenting).
[324] *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 122 (2005) (arguing compellingly how the Rehnquist Court used racist language in nineteenth century Indian cases to "justify and defend the privileges and aggressions of the dominant society against Indian tribes" in the modern era).
[325] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).
[326] *See* 42 U.S.C. § 6926.
[327] *See* Wash. Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).

waste disposal, but Congress allocated federal and state roles somewhat differently. EPA's job is to prescribe minimum criteria for the location, construction, operation and closure of solid waste landfills.[328] All landfills must comply with the federal requirements unless EPA has approved an alternate state plan,[329] which may vary from the federal requirements so long as it meets EPA's performance requirements for health and environmental protection.

In 1992, a waste management district formed by four South Dakota counties purchased non-Indian fee land within the boundaries of the Yankton Sioux Tribe's Reservation for the construction of a new solid waste landfill.[330] Neither the State nor the Tribe had an EPA-approved alternate solid waste plan at that time, yet the waste management district sought a *State* permit and a variance from the federal requirement for an expensive composite liner proposing instead an inexpensive bed of compacted clay.[331] The State quickly applied to EPA for state-wide program approval, which EPA granted except as to Indian reservations.[332] The State then amended its application asserting the landfill was in an area diminished by an 1894 act, and EPA tentatively agreed.[333] The Tribe sued, and the federal court found no diminishment,[334] holding that until EPA approved

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[328] *See* 42 U.S.C. § 6944(a).
[329] *See* Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy; State/Tribal Implementation Rule (STIR), 61 Fed. Reg. 2584, 2585 (Jan. 26, 1996) (explaining that the federal landfill requirements of 40 C.F.R. Pts. 257 and 258 do not apply to states that have approved alternate plans, providing flexibility in certain performance standards).
[330] *See* Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F. Supp. 878, 888-889 (D. S.D. 1995), *aff'd*, 99 F.3d 1439 (8th Cir. 1996), *rev'd sub nom*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).
[331] Southern Missouri Waste Management Dist., 890 F. Supp. at 889.
[332] South Dakota; Final Determination of Adequacy of State/Tribal Municipal Solid Waste Permit Program, 58 Fed. Reg. 52,486, 52,488 (Oct. 8, 1993).
[333] South Dakota; Tentative Determination of Adequacy of State's Municipal Solid Waste Permit Program over Non-Indian Lands for the Former Lands of the Yankton Sioux, Lake Traverse (Sisseton-Wahpeton) and Parts of the Rosebud Indian Reservations, 59 Fed. Reg. 16,647, 16,649 (April 7, 1994).
[334] Southern Missouri Waste Management Dist., 890 F. Supp. at 888.

either the State or Tribal[335] program, the landfill must comply with federal requirements including installation of a composite liner.[336]

The State appealed the trial court's no diminishment holding, which the Eighth Circuit extensively analyzed and then affirmed.[337] The Supreme Court accepted the State's petition for certiorari, overruling the Eighth Circuit to hold the Yankton Reservation diminished,[338] leaving the landfill subject to state not federal regulation. The practical consequence precluded the more stringent federal requirement of an impermeable composite liner beneath the landfill, and legitimized the State's more lenient, and more economically-based, condition of a compacted clay base.

As usual, the Supreme Court's analysis began with a staid, perfunctory recitation of the "rules" that facially supported tribes:[339] only Congress can change the boundaries of reservations; its intent to do so must be "clear and plain"; Congress was often *not* clear in the surplus land acts because of its expectation the reservation system would shortly fade; and most emblematic of the Court's commitment to justice for Indigenous peoples, that all statutory ambiguities would be resolved in their favor.[340] Then, the Court said the Act's particular statutory terms and promise of a lump sum payment for the lands taken created "an almost unsurmountable presumption of diminishment."[341] The clarity of those

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[335] During the dispute, the Tribe submitted a solid waste management plan for EPA approval. *See id.* at 890.
[336] *Id.*
[337] Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439, 1457 (8th Cir. 1996)
[338] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).
[339] Professor David Getches made this point more generally two years earlier using in part the then most recent Supreme Court diminishment case, Hagen v. Utah, 510 U.S. 399 (1994). *See* David H. Getches, *Conquering The Cultural Frontier: The New Subjectivism of The Supreme Court in Indian Law*, 84 CALIFORNIA LAW REVIEW 1573, 1621 (1996) ("While the Court may continue to cite the canons, it is difficult to attribute any significance to them in many recent cases.")
[340] 522 U.S. at 333-334.
[341] *Id.* at 334.

statutory terms was apparently unaffected by the fact they were copied from the "agreement," written in English, by federal officers in the field. Amazingly, the Court was so unabashed by the officers' tactics for negotiating further land cessions from the Tribe, it quoted extensively their explicit threats to break prior treaty commitments of food, clothing and other resources, leaving the Tribe to starve in the approaching northern plains winter.[342] As for the lump sum payment that sealed the presumption of diminishment, a different court found it "unconscionable and grossly inadequate";[343] the Supreme Court noted that fact in a footnote.[344]

D. Trump Internal Memorandum Expanding Notice to Local Governments

The Court's Diminishment doctrine was well established by 1991 when EPA promulgated its original WQS rule. Nothing in the agency's explanation of the final 1991 rule hinted at concern for the risks diminishment posed to EPA's environmental authority in Indian country (illustrated so clearly by *South Dakota v. Yankton Sioux Tribe* just a few years later, or to tribal TAS as shown by *Wyoming v. EPA* some two decades later). As noted *supra*,[345] the primary focus of commenters and EPA then was on discerning the *Montana* test for inherent tribal sovereignty over non-Indians, and applying it to the environmental context. Yet, EPA unwittingly opened the door for the kind of non-Indian animosity driving diminishment claims by creating a semi-public preliminary process on whether tribes seeking CWA TAS approval met the jurisdictional eligibility criterion.

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[342] *Id.* at 346-347.
[343] Yankton Sioux Tribe v. United States, 224 Ct. Cl. 62, 98 (1980).
[344] 522 U.S. at 338 n.2.
[345] *See* text accompanying notes __ to __, *supra*.

When a tribe submitted a TAS application, EPA would notify "appropriate governmental entities"[346] for a 30-day comment period specifically on the Tribe's assertion of authority.[347] The stated purpose was ensuring the tribe had adequate authority to administer the program, and not giving "veto power" to neighboring governments.[348] Ironically, EPA said the process was not intended as a barrier to tribal program assumption.[349] Some commenters (local governments) asked for clarification on appropriate governmental entities, which EPA then defined as states, other tribes and other federal entities.[350] Local governments like cities and counties were not included and EPA would not accept comments from them directly.[351] States were responsible for coordinating with their subdivisions, although EPA said it would place notices in local newspapers.[352]

Twenty-five years later, the several local governments commenting on the 2015 delegation proposal renewed the call for local involvement in this preliminary process.[353] EPA fell back on the impact of promulgating an interpretive rule; it did not (and could not) change the existing governmental notice and comment process so any suggestion for expanding "appropriate governmental entities" was beyond the scope of the instant administrative action.[354] At any rate, EPA asserted the existing process (presumably

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[346] 40 C.F.R. § 131.8(c)(2)(ii).
[347] *Id.* at § 131.8(c)(3).
[348] 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,884.
[349] *Id.*
[350] *Id.*
[351] *Id.*
[352] *Id.*
[353] 2016 TAS Reinterpretation, supra note __, 81 Fed. Reg. at 30,194-30,195.
[354] *Id.* at 30,195.

posting notice in local newspapers) provided appropriate notice to potentially interested parties."[355]

In 2019, President Trump's EPA quietly reversed course in a memorandum labeled "for internal EPA use only" with the exhortation "*do not distribute outside of EPA.*"[356] The memorandum announced a new "focus" on ensuring local governments within and contiguous to Indian country were notified of and had an opportunity to comment on tribal TAS applications.[357] EPA noted the existing CWA and CAA regulations required notice to "appropriate governmental entities,"[358] defined as states, tribes and other federal entities, but it had also used its discretion to inform the public and local governments.[359] Such discretion no longer existed; Headquarters would henceforth "*verify* that the regional office *effectively* reached out to local governments."[360] No comment was made how this extra process aligned with the goal of EPA's Strategic Plan to "streamline those processes by which EPA reviews and approves state and tribal actions."[361]

Since existing regulations limited the comment process to the tribe's assertion of authority, once EPA reinterpreted the CWA TAS provision as a congressional delegation, the only jurisdiction-related issue left was diminishment. The memorandum implicated

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[355] *Id.*
[356] Memorandum from W.C. McIntosh, Assistant Administrator, Office of International & Tribal Affairs, to David Ross, Assistant Administrator, Office of Water, Anne Idsal, Acting Assistant Administrator, Office of Air and Radiation, and Regional Administrators 2 (Aug. 13, 2019) (on file with the author) (emphasis added).
[357] *Id.*
[358] *See, e.g.,* 40 C.F.R. § 131.8(c) (CWA WQS); 40 C.F.R. § 130.16(c) (CWA Impaired Water Listing and Total Maximum Daily Load programs); and 40 C.F.R. § 49. 9 (CAA).
[359] McIntosh Memorandum at 1-2.
[360] *Id.* at 2.
[361] *See* Working Together: FY 2018-2020 U.S. EPA Strategic Plan 27 (Feb. 2019) (Goal 2 More Effective Partnerships), available at https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf.

diminishment in requiring the local notice "describe ... the area covered."[362] As the city and county comments on the 2016 reinterpretation reflected, the real and perceived impacts of tribal jurisdiction over non-Indians are often felt acutely at the local level, and not infrequently foster an intense and visceral anti-Indian sentiment especially among those unfamiliar with (or uninterested in) the complexities of Indian law and history. So whether local outreach might fan the flames leading to an actual diminishment suit, it was likely to provoke diminishment allegations, forcing EPA analysis into that complex area and making the TAS approval process even longer.

Increasing already long waiting times was the main theme of the National Tribal Water Council's (NTWC) objection to EPA's new focus of increased local outreach.[363] Fifteen years earlier, EPA's lengthy delays in TAS review triggered pointed criticism from the Government Accounting Office.[364] EPA responded in 2008 with an extensive strategy guidance for improving the timeliness and efficiency of TAS review.[365] NTWC reminded EPA the strategy said it "should consult" with tribal applicants on *whether* local outreach would be beneficial, and if so, "should tailor" such outreach to the particular circumstances.[366] More to the point, NTWC noted local governments already had opportunities to comment through their states' role in the process, and cited two cases

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[362] *Id.* at 2. That requirement was redundant since tribal TAS applications included maps and/or legal descriptions of the area covered. *See* 40 C.F.R. § 131.8(b)(3)(i).
[363] *See* Letter from Ken Norton, Chairman, National Tribal Water Council, to W.C. McIntosh, Assistant Administrator, Office of International & Tribal Affairs (Jan. 9, 2019), available at http://www7.nau.edu/itep/main/ntwc/PolicyResponseKits/Index.
[364] *See* Indian Tribes: EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs 5, (Oct. 2005) (GAO-06-95), available at https://www.gao.gov/new.items/d0695.pdf.
[365] *See* Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs (Jan. 23, 2008), available at https://www.epa.gov/tribal/strategy-reviewing-tribal-eligibility-applications-administer-epa-regulatory-programs-1.
[366] Letter from Ken Norton, at 2 (quoting the Strategy, at 2). NTWC didn't comment on EPA's attempt to keep the "new focus" document private.

where the outreach process created needless delays.[367] Like EPA, NTWC either overlooked or didn't want to mention diminishment when it asserted there simply was no point in soliciting local input on TAS applications for reservations since Congress had delegated tribal authority there.[368]

IV. Develop Federal Water Quality Standards for Indian Country

It has been less than four years, but since the 2016 reinterpretation EPA has approved only two tribes for TAS status (without WQS) on delegation grounds, one on the pre-delegation standard and nine tribes are pending review.[369] Only 15% of eligible tribes have approved WQS today. Whether the fault lies with EPA, tribes, states, non-Indians, courts, or a combination of all of them, nearly all of Indian country still lacks enforceable WQS. That reality hinders effective implementation of many CWA programs, especially the section 402 NPDES permit program. The most feasible and prompt solution consistent with the national policy of tribal self-determination and EPA's longstanding Indian Policy recognizing tribes as the primary governments responsible for Indian country environmental management is clear, although it sounds oxymoronic: EPA should promulgate federal WQS for all of Indian country not already covered by tribal WQS.

Federal direct implementation (DI) has been a cornerstone of EPA's Indian Program since its inception when the agency found no congressional authorization in the CWA (or any other environmental statute) for state implementation in Indian country. Both the 1980 and 1984 Indian Policies viewed DI as an interim solution to the regulatory gap while

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[367] *Id.* at 2-3 (describing delays attributed to local outreach for approval of the Navajo Nation's TAS amendment and the still pending Seneca Nation TAS application).
[368] *Id.* at 3.
[369] WQS TAS Table, *supra* note __. During review, EPA does not provide tribal applications online so application dates, reliance on delegation nor whether the tribe seeks WQS approval can be easily determined.

tribes prepared for and then assumed program primacy as an exercise of environmental self-determination.[370] The Indian Policies recognized that would take time, and promised tribes assistance in that effort as well as invited their participation in federal direct implementation. And even in the agency's startling misstep in assuming unauthorized state WQS were valid in Indian country,[371] EPA said it would "give serious consideration to Federal promulgation of water quality standards on Indian lands where it finds a particular need."[372] If it was not then, the need today is particularly clear.

There is direct, relevant agency experience suggesting this is feasible solution. Recall the first WQS in Indian country were federal standards for a particular reservation.[373] The idea for expanding the geographic scope to all of Indian country came a decade or so later when only 13 tribes had approved WQS.[374] Discussions among the federal and tribal members of EPA's national Tribal Operations Committee led EPA to suggest addressing the "not insignificant" gap in Indian country water quality protection by adopting a national "core framework" of federal WQS.[375] Fifteen years later, with just 14% of eligible tribes having approved WQS,[376] EPA again raised the possibility of federal "Baseline" WQS applicable to Indian country nationwide.[377]

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[370] 1980 INDIAN POLICY, *supra* note __, at 6; 1984 INDIAN POLICY, *supra* note __, at 2.
[371] 1991 WQS Rule, supra note __, 56 Fed. Reg. at 64,890-64,891.
[372] *Id.* at 64,891.
[373] *See* Water Quality Standards for the Colville Indian Reservation in the State of Washington, 54 Fed. Reg. 28,622 (July 6, 1989).
[374] WQS TAS Table, *supra* note __.
[375] Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards (Jan. 18, 2001) [hereinafter 2001 CORE WQS Proposal], archived at https://archive.epa.gov/ow/ost/web/html/indian-country.html.
[376] WQS TAS Table, *supra* note __.
[377] Federal Baseline Water Quality Standards for Indian Reservations, 81 Fed. Reg. 66,900, 66,902 (Sept. 29, 2016) [hereinafter 2016 Baseline WQS Proposal] (Advance notice of proposed rulemaking).

The nature and timing of these actions, however, created no additional Indian country water quality protection. The first action was specific to the Colville Indian Reservation, and since it occurred just as Congress authorized CWA TAS, EPA logically assumed that further federal WQS would be unnecessary.[378] The core standards concept was issued as an "unofficial, pre-publication" proposed rule in the final days of President Clinton's administration.[379] Within days of George W. Bush's Presidential inauguration, EPA withdrew the proposal "for additional review,"[380] and thereafter the core standards simply disappeared. Something similar happened to the Baseline WQS proposal. It was officially published as an "Advance Notice of Proposed Rulemaking" just four months before the end of President Obama's administration.[381] Thirty-eight comments, mostly in favor of proposing federal WQS, arrived by the December 28, 2016 closing date.[382] President Trump was inaugurated the next month, and no action has been taken since.

These federal WQS initiatives stalled primarily for political as well as practical reasons, and yet they set foundations for effectively closing the Indian country water quality protection regulatory gap. First and foremost, EPA has legal authority to implement federal WQS in Indian country. Where a state simply fails to submit WQS, or submits standards inconsistent with the CWA, Congress required EPA respond to that gap with

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[378] 54 Fed. Reg. at 28,622.
[379] 81 Fed. Reg. at 66,902.
[380] *Id.*
[381] *Id.* at 66,900. An ANPRM is a preliminary step an agency may use to collect public input for shaping a subsequent proposed rule. *See* A Guide to the Rulemaking Process, Office of the Federal Register (undated), available at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (follow hyperlink "How does an agency involve the public in developing a proposed rule?").
[382] See rulemaking docket, available at https://www.regulations.gov/docket?D=EPA-HQ-OW-2016-0405. Seventy written comments were submitted by tribal representatives on the prior Core WQS Pre-proposal and docketed. *See* 2001 CORE WQS Proposal, supra note __, at 5. While the Proposal remains online, the docket is no longer available there.

federal WQS.[383] Arguably, the approximately 260 tribes that have not submitted WQS but could do so as "states" upon application, also triggers EPA's duty to "promptly prepare" federal WQS. The agency's duty to fill the Indian country water quality protection gap also appears more generally in Congress' mandate the agency promulgate federal WQS "in any case" where it determines revised or new standards are necessary to meet a CWA requirement.[384]

Just as states (and tribes) must, EPA's WQS would have to designate the so-called fishable/swimmable uses for reservation waters.[385] The CWA's minimum requirements reasonably encompass Indigenous cultural, traditional and treaty-based uses. The requirement that water quality protect aquatic organisms[386] has long been interpreted by EPA as water quality levels that not only allow fish, shellfish and aquatic wildlife to thrive, but also so they can be safely consumed.[387] Determining safe levels of contamination depends critically on the rate of consumption, which is often significantly higher for native peoples, particularly those who rely on a subsistence lifestyle.[388] Almost two decades ago, EPA's National Environmental Justice Advisory Council recommended:

> Because many American Indian and Alaska Native [] communities are particularly prone to environmental harm due to their dependence on subsistence fishing, hunting, and gathering ... until tribes are able to assume responsibility for [federal environmental] programs ... *EPA should promptly develop effective and appropriate*

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[383] Id. at (b)(1)(A) and (B).
[384] 33 U.S.C. § 1313(c)(4)(B).
[385] *Id.* at. § 1251(a)92).
[386] *Id.* at § 1251(a)(2).
[387] *See, e.g.,* Human Health Ambient Water Quality Criteria and Fish Consumption Rates Frequently Asked Questions 1 (Jan. 18, 2013), available at https://www.epa.gov/sites/production/files/2015-12/documents/hh-fish-consumption-faqs.pdf.
[388] *See, e.g.,* 2016 Baseline WQS Proposal, supra note __, 81 Fed. Reg. at 66,908 (listing options for rates six to eight time higher than the American default rate, in part based on a survey by the Columbia River Intertribal Fish Commission); Fish Consumption and Environmental Justice, National Environmental Justice Advisory Council 136-139 (Nov. 2002), available at https://www.epa.gov/sites/production/files/2015-02/documents/fish-consump-report_1102.pdf.

regulatory strategies for setting, implementing, and attaining water quality standards within Indian country.[389]

The Act's other minimum goal of protecting human recreational uses[390] seems less relevant, but combined with the directive that uses are to protect public health and welfare,[391] could also reasonably encompass non-consumptive Indigenous cultural and traditional uses. In a legal challenge involving a stringent tribal WQS based on ceremonial uses the tribe was unwilling to explain to nonmembers, the court approved of EPA accepting the tribe's description of it as a "primary contact" standard involving incidental ingestion of water.[392] EPA's Baseline WQS proposal similarly noted that cultural ceremonial uses involving full body immersion and body washings come within the Act's protection of recreational uses.[393] Presumably, EPA's standard primary contact numeric criteria would be protective of the variety of water-based ceremonial uses without having to specifically define them.

Any legitimate federal WQS program for Indian country would have to protect at least one important category of cultural and traditional uses that do not fall within the Act's minimum fishable/swimmable uses. Many tribes make cultural uses of aquatic plants, harvesting them for food (like wild rice, cattails, and wapato), cultural products (like reeds, sedges, and rushes for basket weaving, nets and cordage), and medicines (like Rat-tail, Bitterroot, Stinkweed, and Labrador Tea). The variations among tribes and regions would make comprehensively identifying the plants and their uses labor intensive, and reliable

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[389] *Id.* at iv (emphasis added).
[390] 33 U.S.C. § 1251(a)(2).
[391] Id. at § 1313(c)(2)(A).
[392] Albuquerque v. Browner, 97 F.3d 415, 428 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997)
[393] 2016 Baseline WQS Proposal, supra note __, 81 Fed. Reg. at 66,905.

data for particular pollutants' effects on them may not exist. The CWA is capable of handling such situations where numeric standards that quantitively define water quality concentrations of pollutants cannot be determined, by directing states (and tribes) to adopt "narrative" standards that describe the water quality conditions necessary to attain a particular designated use.[394] Where EPA is promulgating federal WQS, it must follow this requirement as well.[395] So for example, EPA might adopt a narrative WQS that waters must be free from pollutants in amounts that prevent the growth of aquatic plants regularly harvested by tribes for cultural or traditional activities.[396]

That example highlights the obvious challenge of adopting federal WQS for reservations nationwide that effectively address the multitude of varying environmental conditions. The best solution is of course having each individual tribe adopt WQS specific to their waters and their priority uses. Thus, any federal WQS program adopted for Indian country should be clear it is not intended to nor does it bar tribes from adopting their own standards. Further, it should not apply to tribes with approved WQS, and as soon as a tribe's WQS are approved they supersede the federal standards. The (expressed) hope should be the federal action spurs tribes to develop their own WQS.

Consistent with the INDIAN POLICY,[397] EPA should make clear how tribes can influence the federal program's application to their particular interests. One option is when specific actions like NPDES permits are proposed on or near a reservation, the agency could consult with a tribe on "site-specific interpretations" of federal WQS for developing permit

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[394] 40 C.F.R. § 131.11(b)(2).
[395] *Id.* § 131.22(c).
[396] *See* 81 Fed. Reg. at 66,906.
[397] 1984 INDIAN POLICY, *supra* note __, at 2 (Principle 3).

conditions necessary to protect identified cultural uses.[398] Another option is "tailoring" the federal program by adding, amending or deleting WQS as suggested by particular tribes to better protect their specific interests.[399] EPA has used both of these approaches in other regulatory programs, twice receiving positive responses from courts.[400] Tribes' longer experience with and dependence on the environment, and the reality that environmental impacts may be felt more acutely by tribal communities, suggests tribal input could offer new insights for improving western models and approaches.[401] For traditional environmental regulatory programs, that claim is largely rhetorical since few if any tribes have environmental programs not modeled on federal laws. But in the uncertain future we face from climate change, tribal Traditional Ecological Knowledge and the relative lack of industry influence that stymies the state and federal governments, tribes approaches to climate change impacts may hold great value.[402] One commentator has even suggested tribal programs might in this sense be innovative

A critical caveat is necessary here. Federal Indian country WQS—indeed, any federal environmental DI for Indian country—avoid the significant legal risks and uncertainties associated with tribal jurisdiction over non-Indians. But one serious risk remains: the

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[398] *See* 2001 CORE WQS Proposal, supra note __, at 5.
[399] *See* 2016 Baseline WQS Proposal, supra note __, 81 Fed. Reg. at 66,905.
[400] *See, e.g.,* Phillips Petroleum Co. v. EPA, 803 F.2d 545, 562 (10th Circuit 1986) (upholding EPA's SDWA underground injection program tailored for the Osage Reserve accounting for tribal preferences); Backcountry Against Dumps v. EPA, 100 F.3d 147, 152 (D.C. Cir. 1996) (noting EPA's offer to accept the Tribe's request for a site-specific regulation revising federal requirements for on-reservation landfill design).
[401] *See, e.g.,* Elizabeth Ann Kronk Warner, *Tribes As Innovative Environmental "Laboratories,"* 86 U. Colo. L. Rev. 789 (2015) (suggesting tribal environmental programs, because of Indigenous cultural connections to the land, can offer states and the federal government different approaches to environment protection).
[402] *See* e.g., Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change On American Indian And Alaska Native Tribes*, 22-WTR Nat. Resources & Env't 45 (2008) (using case studies from the effects of climate change on Alaska natives, arguing tribes must be included in conversations with states and local governments in addressing adaptation policies); Elizabeth Ann Kronk Warner, *Indigenous* Adaptation In The Face Of Climate Change, 21 J. Envtl. & Sustainability L. 129 (2015) (describing the climate change adaptation plans of four tribes to identify trends other tribes might use in developing their own adaptation plans).

looming threat of judicial diminishment hangs over not just tribal jurisdiction, but also federal Indian affairs authority. In the environmental context, where primacy for most regulatory programs are delegated to states, federal DI applies only if Indian country exists to create gaps. *Yankton Sioux Tribe* was a poignant warning. RCRA's stringent federal requirement for an impermeable composite liner did not apply because the landfill was on diminished land and therefore not Indian country.[403] Instead, the landfill was lined with clay as allowed by South Dakota's alternate program. The fact there are two (non-environmental) diminishment cases pending before the Supreme Court this term[404] is cause for continued concern and attention to this risk.

EPA cannot change the status of Indian country[405] but can design program mechanisms helping insulate tribal interests from diminishment threats and impacts. For example, EPA extends TAS and DI programs to trust lands outside formally designated Indian reservations because the Supreme Court has treated such lands as "informal" reservations.[406] That benefits tribes without formal reservations and can address tribal diminishment losses. After *Wyoming v. EPA* held the Wind River Reservation diminished, EPA revised its TAS decision to exclude only non-trust lands in the diminished area, leaving

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[403] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).
[404] *See* McGirt v. Oklahoma (18-9526) (petition granted December 13, 2019); Sharp v. Murphy (17-1107) (petition granted May 21, 2018).
[405] Hydro Resources, Inc. v. EPA, 198 F.3d 1224, 1242 (10th Circuit 2000).
[406] *See, e.g.,* 1991 WQS Rule, supra note __, at 56 Fed. Reg. at 64,881 (citing Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 111 S.Ct. 905, 910 (1991); Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7258 (Feb. 12, 1998). The D.C. Circuit upheld EPA's approach in the CAA TAS Rule. *See* Arizona Public Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied sub nom*, Michigan v. EPA, 532 U.S. 970 (2001).

tribal primacy over the trust lands that made up over 75% of the area as an informal reservation.[407]

Another mechanism can address the chilling effect of state and state subdivisions' diminishment assertions, and ensure tribal interests are protected during any litigation that ensues. The Tenth Circuit endorsed an EPA rule under the SDWA treating "disputed lands" as Indian country and thus subject to federal (or tribal) and not state jurisdiction until the lands were found otherwise.[408] The D.C. Circuit rejected a similar but broader mechanism under the CAA for lands "in question," indicating there must be a genuine dispute and EPA must have procedures for resolving it to determine to avoid perpetual federal jurisdiction.[409] The court specifically indicated it was not opining on whether the disputed lands approach would comply with the CAA requirements.[410]

While non-Indians who choose to live on Indian reservations, and states whose very existence arose directly from the Supreme Court's willing use of ethnocentric 15th century colonial norms might argue differently, judicial diminishment is most directly felt by the tribe and its citizens. As such, federal agencies should be very careful their actions, even if well-intentioned, do not facilitate diminishment claims without close consultation by the tribe whose sovereignty and territory are at risk. Hence, any federal WQS program should have a provision and procedure for particular tribes to opt out regardless of whether the tribe plans to develop WQS.

V. CONCLUSION

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[407] *Compare* Notification of final action, 84 Fed. Reg. 7823 (March 5, 2019) *with* Wyoming v. EPA, 875 F.3d 505, 511 (10th Cir. 2017).
[408] *See, e.g.,* Hydro Resources, 198 F.3d 1224.
[409] Michigan v. EPA, 268 F.3d 1075 (2001).
[410] *Id.* at 1087.

When Congress enacted the modern Clean Water Act in 1972, it gave states that did not already have WQS six months to develop them, 90 days for the Administrator to approve them if consistent with the Act, and if not, then 90 days for the state to make them so or EPA would issue federal WQS.[411] That is, within one year every state would have enforceable WQS or EPA would fill the gap for them. More than three decades since Congress authorized tribal WQS, only 15% of tribes have approved WQS. The gap in Indian country water quality protection is indisputable, and unacceptable.

The gap alone does not prove environmental injustice. Determining tribal citizens in Indian country face disproportionate health risks requires data on reservation water quality. So does developing WQS. If no WQS have been developed, that generally means no data has been collected. So current risk cannot be determined, nor can trends be identified. And permits cannot contain conditions protective of site-specific uses when no uses have been designated. We know generally that many Indians make cultural, traditional and treaty rights-water uses, but without water quality criteria, even concerned permit writers lack the information needed to draft effective permit conditions. Most aquatic cultural foods, items and medicines are thus simply invisible uses left unprotected. Fish consumption is one exception: it is a recognized use with a criteria based on the 90th percentile of Americans—22 grams per day. Native subsistence fishers eat between 142 and 175 grams per day.

Tribal WQS would not make that mistake. Tribes could make their culturally important uses, and the water quality criteria they determine necessary for effective protection, the local value judgments Congress expected would drive the CWA programs.

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[411] 33 U.S.C. § 1313 (a)(3).

Once approved by EPA, federal and state permit writers would be required to translate those tribal value judgments into conditions legally enforceable against non-Indians inside and adjacent to reservations. Tribal certification under section 401 would ensure those conditions are genuine and adequate.

Whatever the reasons for so few tribal WQS, EPA can no longer justify inaction. The federal trust responsibility and environmental justice are relevant moral imperatives. Congress' goal of nationwide environmental coverage is a stark contrast to a regulatory gap the size of New England. The practical risks of transboundary pollution from unregulated reservations and onto them further complicates the national protection goal. Legally, the CWA does not authorize EPA to abdicate its Indian country responsibility to states; the Act's preference for tribal primacy on reservations is clear. The law is also clear EPA must fill gaps that local governments do not. As the first federal agency to embrace tribal self-determination, EPA has the longest running Indian program and is arguably better suited than other agencies to craft a direct implementation program that genuinely encompasses Indigenous cultural and traditional interests, drawing on tribal input and providing opportunities for tailoring where specific needs require different treatment. Politics stopped the first two inquiries into federal WQS; perhaps a petition for a rulemaking from tribes or tribal organizations could break the interminable inertia and finally achieve a measure of environmental protection for Indigenous peoples denied far too long.[412]

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[412] *See* 5 U.S.C. § 553(e) (every agency must give interested persons the right to petition for a rulemaking). A rulemaking petition from states and organizations broke EPA's political and practical reticence to begin even addressing the most significant environmental challenge facing humankind—climate change. *See* Massachusetts v. EPA, 549 U.S. 497 (2007) (forcing EPA to regulate greenhouse gas emissions from new motor vehicles).